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No. _____

In The Supreme Court of the United States

MICHAEL ADAIR, ET AL,
Petitioners,

v.

CHARTER COUNTY OF WAYNE AND WAYNE COUNTY AIRPORT AUTHORITY, ET AL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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December, 2006

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QUESTIONS PRESENTED

1. Whether public employee Petition Clause retaliation claims are subject to the same "public concern" limitation that is applies in public employee Speech Clause claims.

2. Whether a municipality has municipal immunity from Section 1983 liability where the agent who made the constitutionally suspect decisions was the governmental unit's authorized decisionmaker.

PARTIES TO THE PROCEEDINGS

Petitioners are Michael Adair, William Childress, Leon Denton, Charles Elstone, Richard Frederick, Richard Hitch, Ernest Hunter, Charles Johnson, Victor Kline, John Malaniak, Michael Molitor, Paul Molitor, Peter Molitor, David Okoney, Dean Pigott, Bruce Preston, Michael Tavtigian, John Teschke, Robert Tipton and Bradford Vincent.

Respondents are Charter County of Wayne, and Detroit Metropolitan Wayne County Airport Authority.

Defendants below were Charter County of Wayne, Detroit Metropolitan Wayne County Airport Authority, Mark DeBeau, and Kent Booth.

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OPINIONS AND ORDERS BELOW

The ruling of the United States Court of Appeals for the Sixth Circuit dated June 22, 2006 affirming the decision of the District Court is officially reported at 452 F.3d 482 (Opinion, Apx C1-C29). The United States Court of Appeals for the Sixth Circuit denied Plaintiffs' Motion for Rehearing/Rehearing En Banc on October 2, 2006 (Petition for Rehearing, Apx B1-B30). The decision and order of the United States District Court for the Eastern District of Michigan is unreported and is reproduced at Appendices E & F. (Memorandum Opinion and Order, Apx E1-E35; Judgment, Apx F1-F2).

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on June 22, 2006. This Court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that: "Congress shall make no law...abridging...the right of the people...to petition the Government for a redress of grievances.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

STATEMENT OF THE CASE

This petition arises out of an action filed by Plaintiffs against Charter County of Wayne alleging violations of the Fair Labor Standards Act. Plaintiffs latter amended their complaint, adding claims of retaliation in violation of the First Amendment to the United States Constitution, and the Fair Labor Standards Act. Federal court jurisdiction below was based upon the existence of federal questions arising under 29 U.S.C. § 201 et. seq., and 42 U.S.C. § 1983. Therefore, under 28 U.S.C. § 1331, the District Court had subject matter jurisdiction in this case.

Plaintiffs seek review of the decision of the United States Court of Appeals for the Sixth Circuit holding that the "Petition Clause" does not protect Plaintiffs's right to file lawsuits for the redress of grievances unless the lawsuit touches on a matter of public concern. *Adair v. Charter County of Wayne*, 452 F.3d 482, 492 (6th Cir. 2006). The Sixth Circuit's ruling is in conflict with the rulings of other panels of the Sixth Circuit, as well as with the decision of the Third Circuit. Plaintiffs also seek review of the Sixth Circuit's decision finding that Wayne County and Wayne

County Airport Authority enjoy municipal immunity in this action. The precedent of this Court is contrary.

A. The Underlying Facts

Plaintiffs are law enforcement officers employed by Defendants. Plaintiffs are all airport police officers. After the attacks of September 11, 2001, the members of the SWAT Unit, K-9 Unit and EOD Unit (which all included Plaintiffs) were divided evenly on two shifts. The officers were told that, when they were off-duty, they had to stay close to home and be able to respond immediately should the need arise. The officers carried pagers and were subject to discipline for failing to respond to a page. Plaintiffs brought suit against the Charter County of Wayne, alleging that the Fair Labor Standards Act required that Plaintiffs be paid overtime for the time they spent on call. (Plaintiffs's Complaint ¶¶ 5-17).

Appellants filed their First Amended Complaint on April 30, 2002, adding Detroit Metropolitan Wayne County Airport Authority, Mark DeBeau, and Kent Booth as defendants. (Plaintiffs's 1st Amd Complaint). Plaintiffs alleged in their First Amended Complaint that Defendants retaliated against Plaintiffs in violation of the FLSA and the

First Amendment. (*Id.* ¶ 23). On June 12, 2002, Plaintiffs filed their Second Amended Complaint, and on May 23, 2003 Plaintiffs filed their Third Amended Complaint, in which Plaintiffs continued to allege violations of the FLSA and further retaliation in violation of the FLSA and the First Amendment.

B. Disposition of the Case in the District Court

Defendants filed their Motions for Summary Judgment in the spring of 2003. On October 15, 2004, the District Court dismissed all of Plaintiff's causes of action, (Memorandum Opinion and Order, Apx E1-E35; Judgment, Apx F1-F2) and an appeal proceeded.

C. The Court of Appeals's Decision

The Sixth Circuit, in its decision, affirmed the District Court's grant of summary judgment. *Adair v. Charter County of Wayne*, 452 F.3d 482, 494 (6th Cir. 2006). Specifically, on Plaintiffs's § 1983 claim the court said that Plaintiffs cited not authority for the proposition that Petition Clause retaliation claims are not limited to cases involving a public concern. The Sixth Circuit did not reach the merits of Plaintiffs's §

1983 claim. The court also held that Defendants Charter County of Wayne, Wayne County Airport Authority, have municipal liability and that Defendant Mark DeBeau has qualified immunity.

On July 5, 2006, Plaintiffs petitioned the Sixth Circuit for rehearing with suggestion for rehearing en banc. Plaintiffs's petition was denied on October 2, 2006. (Order, Apx A1-A2).

REASONS FOR GRANTING CERTIORARI

I. Conflict Within and Among the Circuits

The decision of the court below extends a conflict among the circuits over whether the "public concern" limitation applies to public employees's claims of retaliation under the Petition Clause of the First Amendment. This Court held in *Connick v. Myers*, 461 U.S. 138 (1983), that where a public employee's speech does not relate to "a matter of political, social, or other concern to the community," government officials can punish employees for that speech. *Id.* at 146. This Court has recently explained the "public concern" rule, stating that "The first [inquiry] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action..." *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1958 (2006)(internal citations omitted).

The United States Court of Appeals for the Third Circuit has held that the "public concern" limitation does not apply to a public employee's claim of retaliation under the Petition Clause of the First Amendment. *San Filippo v. Bongiovanni*, 30 F.3d 424, 442 (3d Cir. 1994). The Third

Circuit held that the mere act of filing a non-sham claim is not a constitutionally permissible reason to retaliate against an employee, regardless of whether the litigation involved a matter of public concern. *Id.* at 443. Prior to *San Filippo*, every circuit to address this issue had held that an employee claiming retaliation for having filed a lawsuit "does not state a claim under § 1983 unless the lawsuit addressed a matter of public concern." *Id.* at 440.

Within the Sixth Circuit, there has been confusion over whether the public concern doctrine applies to Petition Clause retaliation claims. Compare *Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000) ("petition clause is not generally limited to matters of 'public concern'...") with *Jones v. Union City*, 296 F.3d 417, 426 (6th Cir. 2002) and *Valot v. Southeast Local School Dist. Bd. of Ed.*, 107 F.3d 1220, 1226 (6th Cir. 1997). Prior to filing this petition, Plaintiffs petitioned the Sixth Circuit for rehearing with suggestion for rehearing en banc. (Petition Rehear.) This "public concern" issue was presented in the petition for rehearing. The confusion over this issue within the Sixth Circuit could have been cleared up by an en banc panel of the court. However, Plaintiffs's petition was denied (Order, Apx A1-A2), thereby allowing

this confusion to persist. The intercircuit split, as well as the intracircuit confusion, that exists on this issue impairs the uniformity of constitutional protections throughout the Union. This unequal treatment of the First Amendment should not be tolerated given the fundamental importance of the Petition Clause.

What is more, the decision below and the decisions of the majority of the circuits are incorrect. These courts have arrived at the conclusion that the public concern limitation applies to Petition Clause claims based on dicta from this Court. See, Kara Elizabeth Shea, *San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 VAND. L. REV. 1697, 1716 (1995). Review of this case would allow this Court to resolve the conflict among the Circuits, thereby ensuring uniformity of constitutional protections.

A. This Case Squarely Presents the Conflict

In their brief on appeal, Plaintiffs cited the Third Circuit's ruling in *San Filippo* for the proposition that the public concern doctrine does not apply to Petition Clause claims. (Appellant's Final Brief, Apx D85-D88). Plaintiffs

reiterated their position more thoroughly in their Petition for Rehearing, urging the Sixth Circuit to adopt the reasoning of the Third Circuit. (Petition for Rehearing, Apx B27-B29). Despite the existence of the confusion within the Sixth Circuit and conflict that the decision below creates with the Third Circuit, the Sixth Circuit declined to grant rehearing or rehearing en banc in order to clarify the issue. The situation is ripe for this Court to address.

1. Prior to *San Filippo*, the lower courts were generally in agreement that the "public concern" limitation applied to public employee Petition Clause claims. *Id.* at 440. These courts relied on dicta from this Court saying that the Petition Clause "is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). See, e.g., *Belk v. Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988) ("The freedom to petition...is but one of several fundamental freedoms protected by the first amendment.") and *Thorne v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988) ("Petition Clause does not enjoy a special status among First Amendment guarantees...").

Other decisions of the lower courts treated public employees' petitions not as petitions, but as speech. See e.g., *Rice v. Ohio Dept. of Transportation*, 887 F.2d 716, 720-21 (6th Cir. 1989) (holding that discrimination charge was not speech on a matter of public concern) and *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir. 1984) (holding that grievance was not speech on a matter of public concern).

2. In 1994 the Third Circuit decided *San Filippo*. In this 2-1 decision the court engaged in a detailed and thorough analysis of the Petition Clause of the First Amendment. See 30 F.3d at 432-443. The court, afer examining the historical antecedents of the Petition Clause found that the public concern limitation did not apply. While noting the dicta of *McDonald v. Smith*, the court was able to conclude that "the right to petition has a pedigree independent of–and substantially more ancient–than the freedom of speech and press." *Id.* at 443.

3. Since the Third Circuit issued its decision in *San Filippo* it has reaffirmed this decision. See, e.g., *Brennan v. Norton*, 350 F.3d 399, 417 (3d Cir. 2003). None of the other Circuits, however, have joined the Third Circuit. See e.g., *Kirby v. Elizabeth City*, 388 F.3d 440, 448 (4th Cir.

2004). These circuits have failed to give this issue the sort of independent analysis it deserves.

There is also disagreement among the state courts over whether the "public concern" limitation applies to public employee Petition Clause claims. Compare *Buric v. Safir*, 285 A.D.2d 255, 265 (N.Y. App. Div. 2002); with *Pratt v. Ottum*, 761 A.2d 313 (Me. 2000) and *Smith v. Bates Technical College*, 991 P.2d 1135, 1147 (Wash. 2000).

Without resolution of this conflict by this Court, lower courts will continue to disagree over whether the "public concern" doctrine applies to public employee Petition Clause claims. There is no principled reason why Plaintiffs should enjoy fewer First Amendment protections based solely on what Circuit they work in.

B. The Issue Presented by this Conflict is Recurring and is Important

The First Amendment rights Americans enjoy are of fundamental importance, both to the individual and to the nation. This is true even when that petition takes the form of a lawsuit. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of

orderly government. It is one of the highest and most essential privileges of citizenship...." *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907). The right to petition is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 525 (2002) (citation omitted).

As stated above, public employees within the Third Circuit enjoy greater First Amendment protections than public employees in other circuits. A peculiar situation exists in New York, where a public employee suing in a state court would apparently not have to prove a public concern, see *Buric*, 285 A.D.2d at 265, while a public employee suing in federal court would. See *White Plains Towing Corp. v. Patterson*, 991 F.2d, 1049, 1058 (2d Cir. 1993). At the same time, the United States, which has employees in all circuits, must comply with different requirements in different circuits. The effect of this is that the United States's authority varies throughout the states.

II. The Decision Below Is Incorrect

A. The Public Concern Limitation Does Not Apply to Petition Clause Claims

The circuits that have applied the "public concern" limitation to Petition Clause claims have arrived at their conclusions by misapplying dicta of this Court.

1. It is well established that Plaintiffs enjoy a right to file lawsuits in the courts or in administrative bodies. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Plaintiffs' right to file non-sham lawsuits outweighs their employer's interest in being free from suit regardless of whether the lawsuit is a matter of public concern.

The development of the Petition Clause in the last 50 years bears this out. An important advancement in the Petition Clause jurisprudence was the recognition of the *Noerr-Pennington* doctrine adopted in antitrust cases. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) the Court held that no violation of the Sherman Act can be based upon "mere attempts to influence the passage or enforcement of laws," *id.* at 135, even if this petitioning is anti-competitive. Similarly, in

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), this Court held that a concerted effort by unions and coal companies to convince the Secretary of Labor to impose a minimum wage on mines selling coal to the TVA did not violate the antitrust laws, even though it was intended to eliminate competition. *Id.* at 670. In *California Motor*, *supra*, the Court extended this protection to the right to petition through the courts or administrative agencies. 404 U.S. at 510-11. However, the Court noted that there is a sham exception to the *Noerr-Pennington* doctrine. *Id.* at 511. Where petition activity is a mere sham, it cannot escape the antitrust laws.

In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), this Court held that "the filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice" but that "sham litigation...does not involve a bona fide grievance, [and] does not come within the first amendment right to petition." *Id.* at 742. Adopting the "mere sham" standard in public employee litigation cases would better balance the important private and governmental interests than the "public concern" limitation does.

2. The majority of the circuits rely on *McDonald v. Smith*, 472 U.S. 479 (1985) for their position. In *McDonald*, the petitioner had mailed letters to President Reagan and other government officials, criticizing Smith, who was being considered for an appointment as United States Attorney. *Id.* at 480-81. Smith sued McDonald for libel and McDonald defended by claiming his statements were immune from libel under the Petition Clause. *Id.* at 480-82. This Court, in holding that expression labeled as a petition is not immune from libel, said "The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression." *Id.* at 482. Further, the Court said, "These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." *Id.* at 485.

McDonald is distinguishable, however. McDonald's "petition" was purely expressive and was factually indistinguishable from speech. McDonald was not sued for making use of his right to contact government officials with a "petition." Rather, he was sued in libel for the expressive

content of his petition. Given this, it is perfectly legitimate to conclude that the expressive content of his letters should not be treated differently under the Petition Clause than it would be under the Speech Clause. *McDonald*, however, does not limit the right of access to the courts and has nothing to say about the right of access. Therefore, McDonald's Petition Clause claim is distinguishable from Plaintiffs's. It would not undermine the equal status of the various First Amendment clauses to refuse to apply the "public concern" limitation in this case.

3. Plaintiffs are well aware of the important governmental/employer interest in governing the workplace that motivates the "public concern" limitation. Failing to apply the public concern limitation to the right to access, however, would not create the same problems. Given the time, the expense, and the difficulty of litigation, it is hard to believe that by refusing to limit the right of access to claims involving a public concern, governmental agencies will be inundated with lawsuits. It is doubtful that public employees will seek to constitutionalize their speech by filing lawsuits. What is more, the right of access need not be completely unfettered. It can, and should, be limited by the "mere sham"

exception. The right of access outweighs the government interest here, and should not be limited by the "public concern" limitation. Public employees should not be chilled in their pursuit of a remedy when their employer violates their rights.

III. Wayne County And Wayne County Airport Authority Do Not Have Municipal Immunity

It is inarguable that a municipality can be a "person" under § 1983, and therefore liable for constitutional violations it commits. *Monell v. Dept. of Social Services*, 436 U.S. 658, 689 (1978). Municipal liability is imposed under § 1983 when the conduct is pursuant to an "official policy." This Court has previously said that "it is plain" that a municipality can be liable "for a single decision by municipal policymakers under appropriate circumstances." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). There is no requirement that the "official policy" be codified in formal rules. *Id.* Rather, it is enough that "the decision to adopt that particular course of action is properly made by that government's authorized decisionmaker[.]" *Id.* at 481. The identification of policymaking officials is a matter of state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988).

Here, the decision to retaliate against Plaintiffs was made by Mr. Mark DeBeau, the Director of Public Safety for Wayne County Airport Authority. Director DeBeau was the authorized decision maker on whether to remove the pagers, change the K-9 flat rate milage and to eliminate compensatory time. Therefore, Defendants Wayne County and Wayne County Airport Authority can be held liable for his official decisions. This situation is similar to *Pembaur* where this Court held that a county prosecutor was the authorized decision maker law allowed county prosecutor to establish county policy. *Id.* at 484. C.f. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 408 (1997) (holding that Board was not policy maker where parties had stipulated that Sheriff was the policy maker).

The Collective Bargaining Agreement between Wayne County and the Local 502 and Local 3317 unions bear out Mr. DeBeau's decision making authority. Both contracts provide that the Airport Director may cause reasonable rules of conduct and disciplinary procedures to be compiled. Mr. DeBeau has testified that this authority was delegated to him. Therefore, Mr. Debeau was the authorized decision maker on this issue. It was error for the Sixth Circuit to find that

Wayne County and Wayne County Airport Authority had municipal immunity from suit under § 1983. Certiorari should be granted in order to enable Plaintiffs to pursue their remedies against Defendants for Defendants' constitutional torts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted

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December 29, 2006

APPENDIX

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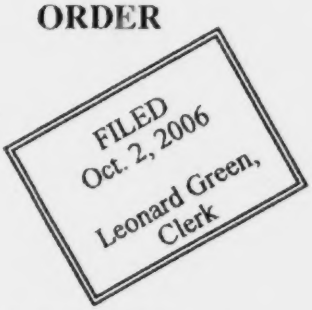
No. 04-2457

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL ADAIR (SWAT), ET AL.,	)	
	)	
Plaintiffs-Appellants,	)	
v.	)	**ORDER**
	)	
CHARTER COUNTY OF WAYNE,	)	
A MUNICIPAL CORPORATION, ET AL.,	)	
	)	
Defendants-Appellees.	)	



BEFORE: SILER, SUTTON, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

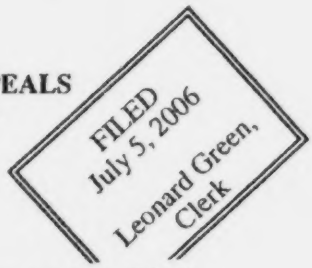
petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Case Nº 04-2457

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



MICHAEL ADAIR (SWAT); WILLIAM CHILDRESS (K-9); LEON DENTON (K-9); CHARLES ELSTONE (K-9); RICHARD FREDERICK (K-9); RICHARD HITCH (AI); ERNEST HUNTER (SWAT); CHARLES JOHNSON (K-9); VICTOR KLINE (SWAT); JOHN MALANIAK (SWAT); MICHAEL MOLITOR (SWAT, EOD); PAUL MOLITOR (SWAT, EDO); PETER MOLITOR (SWAT, EDO); DAVID OKONEY (SWAT); DEAN PIGOTT (K-9); BRUCE PRESTON (K-9); MICHAEL TAVTIGIAN (K-9); JOHN TESCHKE (AI); ROBERT TIPTON (AI); AND BRADFORD VINCENT (AI),
Plaintiffs - Appellants,

v.

CHARTER COUNTY OF WAYNE, A MUNICIPAL CORPORATION; DETROIT METROPOLITAN WAYNE COUNTY AIRPORT AUTHORITY, A MUNICIPAL CORPORATION; MARK DEBEAU, INDIVIDUALLY AND IN HIS CAPACITY AS "DIRECTOR OF PUBLIC SAFETY"; KENT BOOTH, INDIVIDUALLY AND IN HIS CAPACITY AS "POLICE CHIEF" - AIRPORT POLICE DEPARTMENT, JOINTLY AND SEVERALLY,
Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
AT DETROIT

PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING EN BANC

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STATEMENT OF COUNSEL ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Petitioners' case involves questions of extreme importance under the Fair Labor Standards Act and the First amendment. When considering the Petitioners' FLSA claim the panel gave insufficient weight to the evidence presented by Petitioners. Further, a decision issued by the United States Supreme Court on the same day the panel issued its decision in this case, the panel's decision is now inconsistent with Supreme Court precedent. This should be corrected. Finally, this case raises issues of fundamental importance under the First Amendment's Petition Clause that deserve the attention of this Court. These issues are of the upmost importance and should be considered by this Court en banc.

STATEMENT OF THE CASE

A. Nature of the Case

Petitioners originally filed their lawsuit in 2002 in the United States District Court for the Eastern District of Michigan. As filed, Petitioners' 2002 Complaint alleged a violation of the Fair Labor Standards Act, being 29 U.S.C. § 201 et. seq.(hereinafter "FLSA"), against Appellee,

CHARTER COUNTY OF WAYNE (hereinafter "Appellee County"). (R.1, Complaint, JA p. 20).

Pursuant to Fed. R. Civ. P. 15(a), Petitioners filed their First Amended Complaint before Appellees responsive pleadings had been served. The First Amended Complaint added as Defendants, Appellees, DETROIT METROPOLITAN WAYNE COUNTY AIRPORT AUTHORITY, MARK DeBEAU and KENT BOOTH. The First Amended Complaint also added counts of retaliation in violation of the FLSA, as well as a violation of Plaintiffs' rights as secured under the First Amendment of the United States Constitution, as otherwise actionable under 42 U.S.C. § 1983. (R.4, First Amended Complaint, JA p. 26). Then again in early-June, 2002, Petitioners filed their Second Amended Complaint, pursuant to Fed. R. Civ. P. 15(a), adding two more counts of retaliation in violation of the FLSA. (R.8, Second Amended Complaint, JA p. 37).

Petitioners were granted leave to file their Third Amended Complaint in June, 2003, to include additional counts of violations of, and retaliation in violation of, the FLSA, as well as additional counts of violations of their rights as secured under the First Amendment of the United States

Constitution, as otherwise actionable under 42 U.S.C. § 1983. (R.55, Third Amended Complaint, JA p. 53).

Appellees filed their Motions for Summary Judgment in the spring of 2003. (R.51, DeBeau & Booth Mtn Summ Judg, JA p. 184); (R.53, Defs' Mtn Summ Judg, JA p. 207). Petitioners responded to both Motions during the summer of 2003. (R.60, Resp DeBeau & Booth's Mtn Summ Judg, JA p. 5307); (R.76, Resp Defs' Mtn Summ Judg, JA p. 680) .

B. Disposition of Case Below

Oral arguments on Appellees' Motions for Summary Judgment were heard before the Honorable Denise Page Hood in the United States District Court in Detroit on August 6, 2003. (TR, 8/6/03, Hearing Transcript Mtns Summ Judg, JA p. 954). In a Memorandum Opinion and Order dated October 15, 2004, th court dismissed all of Petitioners' causes of action and an appeal proceeded. (R.78, Memo Opinion and Order, JA p. 73); (R.79, Judgment, JA p. 95); (R. 82, Notice of Appeal, JA p. 96). Oral arguments were heard by this Honorable Court on January 24, 2006. On June 22, 2006, this Honorable Court affirmed the District Court's decision dismissing all of Appellee's causes of action. *Adair v.*

Charter County of Wayne, __F.3d__, No. 04-2457 (6th Cir. June 22, 2006).

SUMMARY OF THE ARGUMENT

The On-Call Time Was Compensable

In its decision, this Honorable Court held that the time Petitioners spend on call was not compensable under the FLSA. This Court held that the threat of punishment for failing to respond to a page is not sufficient to make time spent on call compensable. This Court further held that there is no evidence that Plaintiffs were ever subject to discipline for failing to respond to pages while off duty and that there is no policy regarding disciplining employees for failing to respond to pages.

Petitioners were Retaliated Against

The same day that this Court issued its opinion in the instant case, the United State Supreme Court issued its opinion in *Burlington N. & Santa Fe Ry. Co. v. White*, 584 U.S.___, No. 05-259, slip op. (June 22, 2006) defining what constitutes an "adverse employment action" when considering a plaintiff's prima facia case of retaliation under Title VII of

the Civil Rights Act of 1964. *Id.* at pp. 1-2. The Court held that the retaliatory actions of the employer must be "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2.

This is not the same standard used by this Honorable Court in its decision in the instant case. *Adair v. Charter County of Wayne*, ___F.3d___, No. 04-2457, slip op. at 6 (6th Cir., June 22, 2006). There is no principled reason why the standards for determining whether an employer's actions were an "adverse employment action" should differ depending on if the case is a Title VII case or a FLSA case. The statutory language dealing with retaliation is similar. Cf. 42 U.S.C. § 2000e-3(a) with 29 U.S.C. § 215(a)(3). Petitioner's respectfully ask that this Court grant rehearing or rehearing en banc to consider whether the *White* standard should also be applied to retaliation claims under the FLSA.

Petitioners Did State a § 1983 Claim

This Court should grant rehearing en banc to consider the fundamentally important issue of whether a public employee who claims his employer retaliated against him (in violation of the First Amendment Petition Clause) for brining

a lawsuit must show that the original lawsuit dealt with matters of public concern. Petitioners argue that the Petition Clause and the Free Speech Clause are separate and distinct rights that should not be conflated.

ARGUMENT

I. Petitioners' FLSA Claim

A. Officers Were in Fact Subject to Discipline

This Honorable Court of Appeals was incorrect to state that there was no evidence that plaintiffs were subject to discipline for failing to respond to pages while off duty. *Adair v. Charter County of Wayne*, ___F.3d___, No. 04-2457, slip op. at 6 (6th Cir. June 22, 2006). Lt. William Dunbar testified that he has disciplined officers for not responding to a page. (R.76, Resp Defs' Mtn Summ Judg, Ex. 8, Dunbar Dep, pp. 13-14, JA pp. 788-789). Lt. Denton testified that an officer who does not respond to his page was subject to discipline under the Airport disciplinary policy. (R.76, Resp Defs' Mtn Summ Judg, Ex. 11, Lt. Denton Affidavit, JA p. 799). Appellees Elstone, Peter Molitor and Tipton all testified that they were disciplined for not responding when paged. (R.76, Resp Defs' Mtn Summ Judg, Ex. 21, Elstone's

Answers to Interr, JA p. 834); (R.76, Resp Defs' Mtn Summ Judg, Ex. 22, Peter Molitor Dep, pp. 50-51, JA p. 841); (R.76, Resp Defs' Mtn Summ Judg, Ex. 23, Tipton Dep, pp. 20-21, JA p. 844).

Further, Executive Lt. Carl Michalski put out two orders requiring the officers to have their pagers on at all times. (R.76, Resp Defs' Mtn Summ Judg, Ex. 9A, 3/30/94 Order, JA p. 791); (R.76, Resp Defs' Mtn Summ Judg, Ex. 9B, 7/29/96 Order, JA p. 793). Lt. Michalski also testified if members of the special unit did not respond to pages, they were subject to discipline (R.76, Resp Defs' Mtn Summ Judg, Ex. 10, Michalski Dep, pp. 13-14, JA pp. 797-798). Officers assigned to the SRU-SWAT Unit would be removed from the Unit if they missed two cal-in training exercises in a one-year period (R.76, Resp Defs' Mtn Summ Judg, Ex. 4, General Order re: SRU-SWAT, JA p. 759).

What is more, this Court was incorrect to hold that there is "no policy regarding disciplining Plaintiffs for failing to respond to a page." *Adair*, *supra* at 5. Plaintiff presented the affidavit of Lt. Leon Denton that explicitly said that "If an officer were paged and he did not respond he or she would be subject to disciplinary action in accordance with the Department manual." (R.76, Resp Defs' Mtn Summ Judg,

Ex. 11, Lt. Denton Affidavit, JA p. 799). Petitioner submitted sufficient proof to carry its burden and survive summary judgment. This Court should reconsider its decision affirming the District Court's grant of Summary Judgment to Appellees.

B. This Court Should Adopt a "Threat of Discipline" Standard

This Court held that "The mere threat of discipline does not, by itself, prevent employees from effectively using their off-duty time for personal pursuits." *Adair, supra* at 5. Petitioner respectfully request that this Court reconsider this holding.

At least two other Circuits have recognized that the threat of discipline for failure to respond to a call-back is to be considered when deciding if an employee's on-call time is compensable.[1] The Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. White*, 584 U.S.___, No. 05-259, slip op. (June 22, 2006) even recognized the impact that punishment (and by extension, the threat of punishment) can have on an employee. *Id.* at 18.

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[1] *See Pabst v. Oklahoma Gas & Electric Co.*, 228 F.3d 1128 (10th Cir. 2000); *Renfro v. Emporia*, 948 F.2d 1529 (10th Cir. 1991); *Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912 (8th Cir. 1991).

Petitioners submit that the threat of discipline is enough to make on-call time compensable. The employee should not have to present evidence, like that in *Martin v. Ohio Turnpike Comm'n*, 968 F.2d 606, 612 (6th Cir. 1992), of numerous employees being disciplined. It is Petitioner's position that the imposition of discipline for their failure to respond when paged constitutes a severe restriction on their off-time and therefore, is compensable under the FLSA. This Court should take this opportunity to reconsider Petitioners' argument and its decision on this matter.

II. Petitioners' FLSA Retaliation Claim

Petitioners also alleged that they were retaliated against in violation of the FLSA. This Honorable Court held that Petitioners could not make out a prima facia case of retaliation. The Fair Labor Standards Act provides that: (a)...it shall be unlawful for any person- -

> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act. 29 U.S.C. § 215(a)(3).

As part of showing a prima facia case of retaliation, an employee must prove that the employer then took an employment action adverse to him. *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 568 (6th Cir. 1999). This Court held that Petitioners failed to establish this part of their facia case. *Adair*, at 6.

Relying on *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876 (6th Cir. 1996), this Court held that an employment action must be materially adverse, which includes:

> Termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *Adair v. Charter County of Wayne*, at p. 6.

A. The Supreme Court's Decision in *White*

The same day that this Court decided the instant case, the United States Supreme Court defined what constitutes an adverse employment action under Title VII of the Civil Rights Act of 1964. *Burlington N. & Santa Fe Ry. Co. v. White*, 584 U.S.___, No. 05-259, slip op. (June 22, 2006) at pp. 1-2. The Court held that:

> a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' *Id.* at 13(Citations and quotes omitted).

This is significantly different from the standard applied by this Court in the instant case. This Court's definition of adverse employment action does not allow for the consideration of the myriad other actions that an employer may take to discourage its employees from vindicating their rights under the FLSA.

B. The *White* Standard Should Apply in this Case

Petitioner realizes the present case is a retaliation claim under the FLSA while *White* was a retaliation claim brought under Title VII. However, Petitioner submits that there is no rational reason that the anti-retaliation provisions of these two acts should be governed by different standards.

In rendering its decision in *White*, the Supreme Court noted the compelling reasons why the anti-retaliation provision of Title VII should not be limited to terms and conditions of employment. The Court noted that anti-

retaliation provision of Title VII seeks to ensure the objective of a discrimination free workplace by "preventing an employer from interfering (through retaliation) with an employee's efforts to secure" enforcement of the Act. *Id.* at 8. Because of this, the Court said that any action that might well dissuade a reasonable employee from making a charge of discrimination is an adverse employment action. *Id.* at 13.

This same reasoning should apply to the anti-discrimination provision of the FLSA. The anti-retaliation provision of the FLSA makes it illegal

> to discharge *or in any other manner discriminate* against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act. 29 U.S.C. § 215(a)(3) (emphasis added).

The Supreme Court has said that Congress adopted the anti-retaliation provision in order to ensure "effective enforcement" of the FLSA. *Mitchell v. Robert De Mario Jewelry, Inc.*, 316 U.S. 288, 292, 80 S.Ct. 332, 4 L. Ed. 2d 323 (1960). "Effective enforcement could thus only be expected if employees felt free to approach officials with their

grievances." *Id*; *See also Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000).

Thus, § 215(a)(3) serves the same purpose in the FLSA as § 2000e-3(a) does in Title VII. Because of this, the same standard should apply for determining what is an adverse employment action. Just as under Title VII, an employer can discriminate against an employee in more ways than by reducing pay, hours, responsibilities and the like. The same standard should apply to both statutes.

It is instructive to look at the Supreme Court's discussion in *White* of the anti-retaliation provision of the National Labor Relations Act. In *White*, the Court cited to *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740, 103 S.Ct. 2161, 76 L. Ed. 2d 277 (1983) wherein the Court explained that anti-retaliation provision of the NRLA is meant to "'prohibi[t] a wide variety of employer conduct that is intended to restrain...the exercise of protected activities.'" *White*, *supra* at 12. The same reasoning that applies to Title VII and the NRLA should also apply to the FLSA. Section 215(a)(3) of the FLSA forbids "discharge or any other manner of discrimination..." The *White* approach of deciding if the conduct is the type that might dissuade an employee from bringing a claim is more commensurate with the language

"any other manner of discrimination" than the standard applied by this Honorable Court in *Adair* and *Koscis*.

C. There Should Not be Multiple Standards

It should also be noticed that the failure to apply the *White* standard in this case would result in the application of different definitions to the same language. This Court is, of course, required to apply the *White* decision in Title VII cases.[2] This Court should further take this opportunity to create uniformity amongst the various anti-retaliatory provisions. This Court has previously (and rightly so) applied the same standard to claims of retaliation brought under various statutes.[3] Therefore, this Court should take this

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[2] *See United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000).

[3] *See Kocsis*, *supra* at 886-887 (ADA case); *Clark v. Whirlpool Corp.*, 109 Fed Appx 750, 754-755 (2004) (ADA case); *Ford v. GMC*, 305 F.3d 545, 553 (2002) (Title VII case); *Broska v. Henderson*, 70 Fed. Appx. 262, 267 (2002) (Title VII case); *See also*, *Adair*, *supra* (FLSA); *Johnson v. Ohio Dept. of Youth Servs.*, 2003 U.S. Dist LEXIS 10700 at *9 (Same). *See also Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) (ADEA case).

opportunity to reconsider its previous decision in this case in light of *White.*

D. A Reasonable Employee Could Have Been Dissuaded

The retaliatory actions committed by Appellees is the type that might well have dissuaded a reasonable employee from bringing a claim under the FLSA. *White, supra* at 13. The elimination of the flat-rate milage for K-9 officers amounted to a cost of hundreds of dollars a month for those officers. (R. 76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 32, 5/17/02 K-9 Unit SOP; JA p. 891). Further, for those who would prefer that they receive money rather than vacation days, the elimination of comp time would also be sufficient to dissuade a reasonable officer.

III. Petitioners' First Amendment Retaliation Claim

This Court's holding that Petitioners have not stated a claim under § 1983 should be reconsidered. The elements of a First Amendment retaliation claim are:

> (1) That the employee was engaged in a constitutionally protected activity; (2) that the defendants's adverse action caused the

> plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights. *Strouss v. Michigan Dep't of Corrections*, 250 F.3d 336, 345 (6th Cir. 2001).

This Court held that Plaintiff's did not make out a First Amendment Petition Clause claim because the lawsuit did not address matters of public concern.

A. "Public Concern" Limitation Should Not Apply to Petition Clause Claims

In *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994) the court held that a First Amendment Petition Claim need not address matters of public concern. *Id.* at 441-443. The court noted that when one petitions the government for redress of grievances, one is not appealing "over the government's head" to the general public (as in a Free Speech case), but rather is utilizing procedures to ask government to fix what "government has broken." *Id.* at 442. The Third Circuit noted that the right to petition for redress of grievances has "a pedigree independent of–and substantially more ancient–than the freedoms of speech and press." *Id.* at

443. The right to petition for redress of grievances is a right granted to all citizens and the same standard should apply in all cases where a citizen seeks redress through the courts.

Our Supreme Court has recognized that the right to petition the government for redress of grievance is "a right conservative of all others, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148, 28 S.Ct. 34, 52 L. Ed. 143 (1907). Here, Petitioner were not punished for making public a private dispute (as in a Free Speech case) but were punished for seeking to have the law correctly applied, as is their right to do under the First Amendment. *Id.* The public concern limitation should not apply to Petition cases.[4]

In its decision in the present case this Court relied on *Nicklas v. Eagle*, No. 99-2338, 45 F. Appx. 385 (6th Cir. Aug 22, 2002). That case cited several other cases for the proposition that a retaliation claim cannot be brought unless the plaintiff's suit regarded matters of public concern. Two

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[4] *See Gable v. Lewis*, 201 F.3d 769, 771-772 (6th Cir. 2000) (holding that there is not Sixth Circuit authority limiting petitioning activity by public employees to matters of public concern).

of the cases *Nicklas* mentions, *Connick v. Myers*[5] and *Dun & Bradstreet v. Greenmoss Builders*,[6] were Free Speech cases, not Petition cases. The other cases relied upon by the *Nicklas* court should not be followed. They failed to give the Petition Clause its proper understanding and simply conflated it with the Free Speech Clause.[7] Both of these cases are incorrect. This Court should follow the lead of the Third Circuit and recognize the importance and distinction of the right to petition for redress of grievances.

Petitioners respectfully request that this Honorable Court take this opportunity to grant rehearing en banc and consider this important matter. This issue is of fundamental importance as it directly determines the rights of public employees in this Circuit to petition the government for redress of grievances. It was error to hold

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[5] 461 U.S. 138, 103 S.Ct. 1684, 75 L. Ed. 2d 708 (1983).

[6] 472 U.S. 749, 105 S.Ct. 2939, 86 L. Ed. 2d 593 (1985).

[7] *Zorzi v. County of Putnam*, 30 F.3d 885, 896 (7th Cir. 1994); *Hoffman v. Liberty*, 905 F.2d 229, 232 (8th Cir. 1990).

that Petitioners had not made out a Petition Clause claim as there is no requirement that public employee lawsuits address a matter of public concern.

CONCLUSION

Petitioners have presented evidence that they were indeed subject to discipline for failing to respond to pages when off duty. Petitioners also presented evidence that there was a policy to discipline those officer who did not respond to pages. Lastly, Petitioners submit that this threat of punishment is enough to make the on-call time compensable under the FLSA. In regards to Petitioners' retaliation claim under the FLSA, the newly adopted *White* standard should be applied to FLSA claims. Both statutes consider the same issue–what is discrimination? Finally, this Court should correct the erroneous holding that a public employee cannot make out a Petition clause claim unless his lawsuit addresses a matter of public concern.

WHEREFORE, Petitioners respectfully request that this Court grant rehearing or rehearing en banc.

Respectfully submitted this 5th day of July, 2006.

/s/ Jamil Akhtar (LG)

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FILING AND MAILING CERTIFICATE

In compliance with Fed. R. App. P. 25(c), I hereby certify that on this 5th day of July, 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Sixth Circuit the required number of copies of this PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING EN BANC and further certify that I mailed via U.S. Mail this same date from Cincinnati, Ohio one copy to opposing counsel.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

/s/ Lance Gifford
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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 06a0206p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL ADAIR, WILLIAM CHILDRESS, LEON DENTON, CHARLES ELSTONE, RICHARD FREDERICK, RICHARD HITCH, ERNEST HUNTER, CHARLES JOHNSON, VICTOR KLINE, JOHN MALANIAK, MICHAEL MOLITOR, PAUL MOLITOR, PETER MOLITOR, DAVID OKONEY, DEAN PIGOTT, BRUCE PRESTON, MICHAEL TAVTIGIAN, JOHN TESCHKE, ROBERT TIPTON, and BRADFORD VINCENT, *Plaintiffs-Appellants*,	)	No. 04-2457
v.	)	
CHARTER COUNTY OF WAYNE, a Municipal Corporation, DETROIT METROPOLITAN WAYNE COUNTY AIRPORT AUTHORITY, a Municipal Corporation, MARK DEBEAU, Individually and in his capacity as Director of Public Safety, KENT BOOTH, Individually and in his capacity as Police Chief - Airport Police Department, Jointly and Severally, *Defendants-Appellees*.	)	

FILED
June 22, 2006
Leonard Green, Clerk

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 02-71139—Denise Page Hood, District Judge.

Argued: January 24,2006
Decided and Filed: June 22, 2006

Before: SILER, SUTTON, and COOK, Circuit Judges.

COUNSEL

ARGUED: Jamil Akhtar, AKHTAR, WEBB & EBEL, Troy, Michigan, for Appellants. Deborah L. Brouwer, NEMETH BURWELL, Detroit, Michigan, for Appellees. **ON BRIEF:** Jamil Akhtar, AKHTAR, WEBB & EBEL, Troy, Michigan, for Appellants. Deborah L. Brouwer, NEMETH BURWELL, Detroit, Michigan, for Appellees.

OPINION

SILER, Circuit Judge. Plaintiffs comprise a group of officers employed by the Wayne County Airport Authority and assigned to several specialty units. While off duty, they were required to carry pagers and to remain within a specified geographic area in order to maintain

availability during off-duty hours. They filed suit under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), seeking overtime compensation for all hours not on duty but during which they carried the pagers. After suit was filed, Airport Authority management requested that officers return their pagers and also eliminated compensatory time in favor of overtime and assigned county-owned vehicles to the K-9 officers. Based on these actions, Plaintiffs amended their complaint to include claims of retaliation in violation of the FLSA and 42 U.S.C. § 1983. The district court granted summary judgment to Defendants on all claims. Because Plaintiffs are not entitled to overtime pay under the FLSA, and because Defendants' actions do not constitute retaliation, we affirm.

I. BACKGROUND

Plaintiffs are police officers assigned to the Wayne County, Michigan airport, which services much of Michigan's lower peninsula, including the entire Detroit metropolitan area. All employees of the airport police department were originally employees of the Wayne County Sheriffs Department until the Airport Authority was formed as a separate entity to operate the airport on

March 26, 2002. Generally, Plaintiffs were scheduled to work a forty-hour workweek. If Plaintiffs wanted to work overtime, they would place their names on an overtime list and would be called to work according to seniority and/or their collective bargaining agreement, if and when overtime hours became available. An officer could refuse the overtime offered. Officers working overtime were paid overtime pay.

The Plaintiffs in this case are members of four specialty police units, including the Special Response Unit (SRU-SWAT), Explosive and Ordnance Disposal (EOD-Bomb Squad), K-9, and the Accident Investigation Unit (AI). Officers belonging to these specialty units receive extra "specialty pay." All officers in the four specialty units had to live within a close geographical area to the airport. Members of the K-9 and EOD-Bomb Squad units had to agree, as a condition of employment, to live within a thirty-minute travel time from the airport. SRU/SWAT officers are required to maintain reasonable availability when off duty.

Further, officers assigned to the four specialty units were required to carry digital pagers which operated on a state-wide basis. The pagers were to be carried both on and

off duty and always turned on. K-9, SRU-SWAT, and EOD-Bomb Squad officers all agreed to respond to calls for service at all hours as a condition of being selected to the unit. Two Plaintiffs testified that they were orally counseled for not responding when paged, and other Plaintiffs testified they understood that failure to respond to an off-duty page would result in discipline.

Prior to September 11, 2001, Plaintiffs claim they generally could attend to their personal business while off duty, subject to responding when paged. However, immediately after the events of September 11, the officers were placed on twelve-hour shifts, seven days per week, and had their leave and vacation days cancelled. On September 21, the shifts were reduced to ten hours, six days per week. SRU-SWAT, K-9, and EOD-Bomb Squad officers were told that, when they were off duty, they had to stay close to home and be able to respond immediately should the need arise. This continued until November 26,2001, when the officers went on a five-day per week schedule, ten hours per day, and were allowed to use their vacation time.

In October 2001, shortly after the terrorist attacks, Defendant Mark DeBeau was hired as the Director of

Public Safety at the airport. He was directed to review his department's administrative functions and expenses. Due to his review, the airport considered a number of changes in its policing operations. Several of these policy changes were later implemented. Airport management issued specially-outfitted sports utility vehicles to each of its K-9 officers, and discontinued the payment of flat rate mileage for driving to and from work to those officers. Management also decided to freeze the accumulation and use of banked compensatory time, or "comp time," due to staffing problems caused by the September 11 terrorist attacks and resulting personnel requirements mandated by the federal government. Allowing officers to utilize comp time, in addition to vacation time, forced the airport to rely on (and pay for) overtime to compensate for their absences. Instead of paying officers comp time for certain activities, the airport decided that it would be less costly to pay its officers actual overtime pay. Later, the sport utility vehicles were returned to the airport and the flat rate mileage reimbursement policy was reinstated due to the dissatisfaction of the K-9 unit officers and their union.

In 2002, twenty-five officers filed suit against Wayne County seeking overtime pay under the FLSA.

After the initial complaint was filed, airport management collected the pagers from all of its officers at the airport. Plaintiffs then amended their complaint to add a second count under 42 U.S.C. § 1983, alleging that the collection of all pagers was unlawful retaliation against them. Plaintiffs later added a retaliation claim under the FLSA for the changes implemented by the airport as recommended by Mark DeBeau. This appeal names Wayne County and the Wayne County Airport Authority as municipal defendants and DeBeau, Director of Public Safety, as a defendant individually and in his official capacity.[1]

II. DISCUSSION

We review a district court's grant of summary judgment de novo. *Allen v. Michigan Dep't of Corrections*, 165 F.3d 405, 409 (6th Cir. 1999). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

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[1] Although Kent Booth, Police Chief, is named as an individual defendant in the lawsuit's caption, Plaintiffs do not address his liability in their brief on appeal.

A. Plaintiffs' Demand for Overtime Pay under the FLSA

Plaintiffs first claim that the district court erred in ruling that they failed to state a claim under the FLSA for overtime compensation. Their chief contention is that carrying pagers as required by the airport entitles them to overtime pay for all hours not at work that the pagers were worn.

The FLSA "provides that employees must be compensated at one and one-halftimes their regular rate for overtime work." *Martin v. Ohio Turnpike Comm'n*, 968 F.2d 606, 609 (6th Cir. 1992) (citing 29 U.S.C. § 207(a)). Although the FLSA does not state whether time spent on call is working time, the Supreme Court has held that, under some circumstances, waiting time is compensable. *See Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944). Both *Armour* and *Skidmore* involved plaintiff firefighters required to spend approximately half of their time off in firehouses in order to respond quickly to alarms. The Court declined to rule definitively as to whether on-call time is working time; rather, those cases held that the result turns on whether an employee's time is spent predominantly for

the employer's benefit or for the employee's, a question dependent upon all the circumstances of the case. *Armour*, 323 U.S. at 133.

Although the *Armour* and *Skidmore* plaintiffs spent their off-time on the employers' premises, this circuit has acknowledged that "an employee may be entitled to compensation even though he or she is on call at home or elsewhere." *Martin*, 968 F.2d at 609. In *Martin*, we held that "on-call time spent at home may be compensable if the restrictions imposed are so onerous as to prevent employees from effectively using the time for personal pursuits." *Id.* at 611. That case considered the claims of highway maintenance workers for overtime pay to compensate them for time spent away from work but on call and subject to telephone or pager summons from the employer. *Id.* at 607-08. The *Martin* plaintiffs, unlike Plaintiffs here, were designated as either on or off call, and on-call employees were summoned to work before off-call employees. The workers could determine the likelihood of being summoned by consulting the roster of employees who had worked the least amount of overtime to date. *Id.* During a three-year period, while there were 69 instances of discipline for failing to report when called, no employee was ever

discharged for such a failure. *Id.* at 608. Finally, there was no evidence that the workers were called to work with any frequency. *Id.*

The *Martin* court evaluated the claims in light of the precedent of other circuits and the Department of Labor's promulgated regulations concerning the compensability of on-call time. *Id.* at 610-11. The relevant regulations provide that "[t]ime spent at home on call mayor may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits" and that "where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable." 29 C.F.R. § 553.221(d). This court found summary judgment against the plaintiffs' claims appropriate because they failed to demonstrate that the employer's on-call policy resulted in severe restrictions on their personal time, imposing "burdens that seriously interfere with their ability to use the time for personal pursuits," such as being summoned to work so frequently that effective use of personal time was made impracticable. *Id.* at 611-12. That some of the plaintiffs' personal activities may have been affected was deemed insufficient

to establish a FLSA claim. *Id.* at 611; *see Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999); *see also Rutlin v. Prime Succession, Inc.*, 220 F.3d 737, 744 (6th Cir. 2000) (licensed funeral director and embalmer owed overtime compensation for time spent on 15 to 20 phone calls he received per night while on call, but owed no overtime pay for the rest of on-call time that required him to remain at home and "prevented him from drinking alcohol, visiting his children, or boating").

Plaintiffs proffer three reasons why the airport management's on-call policy is so "severely restrictive" as to require payment of overtime compensation under the FLSA. First, they argue that their personal pursuits are severely restricted because they are subject to discipline for not responding when paged. Plaintiffs argue that the *Martin* court noted an unpublished district court opinion which concluded that the employees' obligation to respond to the pages prevented them from using the time for their own purposes because the employees were subject to discipline. *See Martin*, 968 F.2d at 610-11 (discussing *Owens v. ITT Rayonier, Inc.*, No. C88-533T, 1990 U.S. Dist. LEXIS 18715 (W.D. Wash. Sept. 26, 1990)). However, the *Martin* court explicitly discredited the reasoning of that decision

because it failed to cite any cases or rest on any legal analysis for support.[2] *Id. Martin* then went on to note that the defendant's policy included discipline for failure to respond to a page. Although the defendant took disciplinary action 69 times in a three-year period for failure to respond to a page, the *Martin* court did not find that this policy was especially restrictive or burdensome and granted summary judgment in favor of the defendant. *Id.* at 612.

The district court concluded that Plaintiffs were not severely restricted by the Defendants' on-call policy because Plaintiffs admitted that they could engage in all of their regular activities while off duty. Although Plaintiffs assert that the fear of imposition of discipline alone is sufficient to transform otherwise non-compensable time into compensable time, they provide no precedent holding the same. The on-call policy at issue in this case presents no objective restrictions on Plaintiffs' off-duty time besides requiring them to carry pagers. The law in this circuit plainly states the test for determining whether off-duty time is compensable: whether, during that time, the employer

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[2] Moreover, the Ninth Circuit laterreversed that decision. *See Owens v. ITT Rayonier, Inc.*, 971 F.2d 347, 348 (9th Cir. 1992).

imposes burdens on the employee so onerous that they prevent employees from effectively using their time for personal pursuits. *Id.* at 611. The mere threat of discipline does not, by itself, prevent employees from effectively using their off-duty time for personal pursuits.

Furthermore, there is no evidence that Plaintiffs ever were subject to discipline for failing to respond to a page while off duty. Only three Plaintiffs claim to have been disciplined. One Plaintiff was orally counseled for failing to answer a page while on duty and another Plaintiff was disciplined for not carrying his pager while on duty. Despite the existence of airport management orders requiring Plaintiffs to carry their pagers at all times, there is no policy regarding disciplining Plaintiffs for failing to respond to a page.

Second, they argue that the restriction on their ability to live outside the geographical limits associated with their positions constitutes severe restriction. However, employment of EOD-Bomb Squad and K-9 officers was contingent on their agreement to live within thirty minutes of the airport. The pagers they carried operated on a state-wide basis, allowing them to travel throughout Michigan in their off-duty time. Plaintiffs could refuse to answer pages.

If they did report to work when paged, they received overtime pay for such work. Importantly, Plaintiffs admitted that they could engage in all of their regular personal activities while off duty. Additionally, Plaintiffs failed to demonstrate that they received so many calls that they could not effectively use their off-duty time. In three years, SRU-SWAT was called only once, while EOD-Bomb Squad and AI units were called in twice. The K-9 unit was called between fifteen to twenty times.

Third, Plaintiffs argue that the airport's requirement that they remain at home to wait for a call after the September 11, 2001 attacks also severely restricted their ability to attend to personal pursuits. The airport management's post-September 11 terrorist attack policy that temporarily required Plaintiffs to remain close to home for enhanced availability in case of emergency also does not create compensable time. While at home, Plaintiffs' activities were not restricted in any way; thus, the emergency management policy in place during those months did not severely restrict Plaintiffs' personal activities. Moreover, Plaintiffs testified that they were rarely called in during this period. The evidence reveals

that Plaintiffs' off-duty time was not utilized predominantly for the employer's benefit, but for the employees'.

The evidence and arguments presented by the Plaintiffs are insufficient to show that Defendants acted in violation of the FLSA.

B. Alleged Unlawful Retaliation in Violation of the FLSA

Plaintiffs argue that the district court erred in finding that they failed to state a claim of retaliation in violation of the FLSA. They specifically disagree with the district court's conclusion that the actions taken by airport management were not materially adverse and were not motivated by the filing of Plaintiffs' lawsuit.

The anti-retaliation provision of FLSA provides that an employer is prohibited from "discharg[ing] or in any other manner discriminat[ing] against [an] employee because such employee has filed [a] complaint or instituted...any proceeding under [the FLSA]." 29 U.S.C. § 215(a)(3). The burden-shifting analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to a FLSA claim of retaliation. *See, e.g., Moore v. Freeman*, 355 F.3d 558, 562 (6th Cir. 2004). To establish a prima facie case of retaliation, an employee must prove that (1) he

or she engaged in a protected activity under the FLSA; (2) his or her exercise of this right was known by the employer; (3) thereafter, the employer took an employment action adverse to her; and (4) there was a causal connection between the protected activity and the adverse employment action. *See, e.g., Williams v. Gen. Motors Corp.*, 187 F.3d 553, 568 (6th Cir. 1999). Such a prima facie showing of retaliation "creates a presumption that the employer unlawfully discriminated against the employee." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to set forth a legitimate, non-discriminatory reason for the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802. If the defendant carries this burden, the plaintiff then must prove by a preponderance of the evidence that the defendant's proffered reasons were not its true reasons, but merely a pretext for illegal discrimination. *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 883 (6th Cir. 1996).

Plaintiffs here satisfy the first two prongs of the burden-shifting analysis. They engaged in a FLSA-protected activity, filing a cause of action seeking overtime pay, and notified Defendants of the activity by serving

them with the complaint. More questionable is whether Plaintiffs satisfied the third and fourth prongs of the framework.

Materially Adverse Employment Action

The third prong requires an adverse employment action taken against the employee by the employer. The employment action must be materially adverse. *Kocsis*, 97 F.3d at 887. Employment actions qualifying as materially adverse include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id.* at 886 (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)). Mere inconvenience or an alteration of job responsibilities fail to constitute materially adverse employment actions. *Id.*

Plaintiffs complain that Defendants took adverse action against them by ordering their pagers returned. Such an action is not materially adverse. Plaintiffs did not suffer any loss or diminution of wages, benefits, or responsibilities. Moreover, Plaintiffs' initial action solely

concerned their dissatisfaction with carrying the pagers; they cannot now credibly assert that management's decision to remove the pagers was in any way adverse.

Plaintiffs also complain that Defendants' decision to eliminate the mileage reimbursement for K-9 officers and to provide them with county-owned and maintained SUVs, specially outfitted with necessary equipment for the officers' dogs, for transportation was materially adverse. Plaintiffs were not denied any reimbursement for mileage already accrued on their personal vehicles; Defendants only changed the policy for K-9 transportation, and the evidence reflects that the policy change was not taken to retaliate against the Plaintiffs. Indeed, the purchase of the SUVs was a subject of negotiations for several years prior to May 2002 and two weeks after the SUVs were issued to the officers, they were returned to the county and the mileage reimbursement was reinstated. The transportation policy change did not constitute an adverse employment action.

Plaintiffs finally complain that the freeze on accumulation and use of banked compensatory time was an adverse action. This did not result in a material loss of benefits, termination, demotion, transfer, or alteration of job responsibilities. Plaintiffs simply were required to

utilize vacation days for just that - vacation - rather than permitted to save vacation time and later exchange it for pay. Moreover, the Airport Authority did not deprive Plaintiffs of any benefit by freezing the accumulation of overtime pay; now officers working overtime receive pay instead of earning comp time. Plaintiffs fail to prove that the actions taken by the Airport Authority were materially adverse.

Causal Connection

The fourth prong of the prima facie case requires Plaintiffs to prove a causal connection, that is, that the filing of the suit caused the alleged retaliation. In order to demonstrate a causal connection, "a plaintiff must produce sufficient evidence from which an inference can be drawn that the adverse action would not have been taken had the plaintiff not filed a discrimination action." *Allen*, 165 F.3d at 413. "Although no one factor is dispositive in establishing a causal connection, evidence that the defendant treated the plaintiff differently from identically situated employees or that the adverse action was taken shortly after the plaintiff s exercise of protected rights is relevant to causation." *Id.* However, that the actions

complained of followed the protected activity closely in time, standing alone, is insufficient to establish the causation element of a retaliation claim. *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000) (summary judgment for employer on retaliation claim affirmed where plaintiffs only evidence of causation was timing).

Although Plaintiffs here speculate that the Airport Authority implemented policy changes to retaliate against them for filing suit, they provide no factual support for their contentions. Subjective beliefs, without affirmative evidence, are insufficient to establish a claim of retaliation. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 584-85 (6th Cir. 1992). That the changes occurred does not compel the conclusion that they occurred to retaliate against the Plaintiffs. Moreover, that changes were imposed on officers not involved in the lawsuit strongly negates the argument that airport management's actions were motivated by the filing of the suit. *See Moon v. Transport Drivers*, 836 F.2d 226, 230 (6th Cir. 1987) (citing B. Schlei & P. Grossman, *Employment Discrimination Law*, Ch. 15 (2d ed. 1983), at 558-59 ("Proof that similarly situated nonprotestors were disciplined just as harshly for the same infraction suggests nonretaliation.")).

Defendants' Legitimate, Nondiscriminatory Reasons

Even if Plaintiffs established a prima facie case of retaliation, the district court correctly concluded that Defendants acted for legitimate, nondiscriminatory reasons. First, the Airport Authority decided to remove the pagers from Plaintiffs - and all the airport's officers - after the suit was filed, but only because Plaintiffs complained that the pagers were burdensome. Second, the Airport Authority supplied K-9 officers with fully-equipped, county-owned SUVs for transportation of their dogs; their claim that this action was taken for efficiency reasons is wholly credible. Furthermore, that the flat rate mileage policy was reinstated immediately after Plaintiffs complained of its removal supports a finding that the change was nondiscriminatory. Finally, Defendants argue that freezing the accrual of compensatory time served safety and economic goals; it helped ensure that the airport would be adequately staffed and paid overtime work with overtime pay, rather than additional vacation time. Like the other changes, this policy applied to all airport officers, not just the Plaintiffs. Given such evidence, any prima facie case of retaliation demonstrated by the Plaintiffs is rebutted by Defendants'

showing of legitimate, nondiscriminatory reasons for instituting the allegedly adverse changes.

Pretext

Plaintiffs counter that Defendants' stated reasons for implementing policy changes are mere pretext for retaliation. To raise a genuine issue of fact as to pretext and defeat a summary judgment motion under this position, the Plaintiffs must show that (1) the proffered reason had no factual basis, (2) the proffered reason did not actually motivate Defendants' action, or (3) the proffered reason was insufficient to motivate the action. *Cicero v. Borg-Warner Automotive, Inc.*, 280 F.3d 579, 589 (6th Cir. 2002). Because Plaintiffs provide no argument on their challenge of pretext, it is waived. *See United States v. Sandridge*, 385 F.3d 1032, 1035 (6th Cir. 2004).

C. Section 1983/First Amendment Retaliation

Plaintiffs' final claim charges Defendants with violating their First Amendment right to be free from retaliation for speaking out against official policy and for filing a lawsuit. The district court properly found that Plaintiffs failed to state a claim for relief under Section 1983.

To state a successful claim under 42 U.S.C. § 1983, Plaintiffs "must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of state law." *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992). Plaintiffs need to demonstrate that (1) the conduct at issue must have been under color of state law, (2) the conduct caused a deprivation of constitutional rights, and (3) the deprivation occurred without due process of law. *Nishiyama v. Dickson County*, 814 F.2d 277, 279 (6th Cir. 1987). Because Section 1983 is not itself a source of substantive rights, but only a method for vindicating federal rights elsewhere conferred, a plaintiff must set forth specific constitutional grounds for asserting a Section 1983 claim. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989); *Upsher v. Grosse Pointe Pub. Sch. Sys.*, 285 F.3d 448, 452 (6th Cir. 2002).

A plaintiff, in order to succeed on a First Amendment retaliation claim, must demonstrate the following: "(1) that she was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was

motivated at least in part as a response to the exercise of the plaintiffs constitutional rights." *Strouss v. Michigan Dep't of Corrections*, 250 F.3d 336, 345 (6th Cir. 2001) (citations omitted). When the plaintiff is a public employee, she must show that her conduct was protected. *Id.* at 345-46. First, she must demonstrate that her speech touched on matters of public concern. *Id.* at 346 (citing *Connick v. Myers,* 461 U.S. 138, 146 (1983)). Second, the employee's interest "in commenting upon matters of public concern" must outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

Plaintiffs here, public employees, fail to demonstrate that their speech touched on matters of public concern. They cite one newspaper article and one editorial in the *Detroit News* that demanded return of the pagers to Plaintiffs in order to ensure the safety of Michigan residents traveling through the airport. The article and editorial, however, were published after the fact of the lawsuit's filing, which initially contained only complaints about the Plaintiffs' concerns regarding non-payment of overtime while on call. Nothing in the FLSA claim

indicates that Plaintiffs were filing a lawsuit involving matters of public concern. *See Connick*, 461 U.S. at 146 ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices."). Thus Plaintiffs establish no First Amendment Free Speech Clause claim. Nor do they establish a First Amendment Petition Clause claim, citing no authority to illustrate that public employees enjoy the right to file lawsuits to redress grievances without commenting on matters of public concern. *See Nicklas v. Eagle*, No. 99-2338, 45 F. App'x 385 (6th Cir. Aug. 22, 2002) (unpublished).

Municipal Liability

Even if Plaintiffs were able to demonstrate that they were deprived of a federal constitutional right as a result of the actions taken by airport management, they must also show that an official policy or custom of Wayne County or the Airport was the "moving force" behind the constitutional violation in order to recover from the municipality. *See Liptak v. City of Niles*, No. 98-4078, 1999

U.S. App. LEXIS 29984, at *16 (6th Cir. Nov. 10, 1999) (unpublished).

To recover against a municipality, the plaintiff must prove that the municipality itself caused the constitutional violation; respondeat superior does not attach under Section 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 694-95 (1978). In other words,

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent *official policy*, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694 (emphasis added). A municipality may be liable under Section 1983 for actions of its authorized policymakers "where - and only where - a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986); *id.* at 480-81 (noting that "'official policy' often refers to formal rules or understandings - often but

not always committed to writing - that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time"). The policymaker for whose conduct the plaintiff seeks to hold the municipality liable must possess final authority to create official policy with respect to the action ordered. *Id.* at 481.

The Plaintiffs here have cited to no official policy or custom of Wayne County or the Airport which resulted in their alleged constitutional injury. The actions taken by airport management in this case do not constitute official policy. First, Director of Public Safety DeBeau, rather than Wayne County decisionmakers or the Airport itself, made the decisions to remove the pagers, provide SUVs to the K-9 unit, and modify use of compensatory time. While the Director of Public Safety position carries with it considerable influence over the daily operations of the airport, it cannot fairly be considered that of a "final policymaker"; DeBeau's position does not make him a "final policymaker unless [his] decisions are final and unreviewable and are not constrained by the official policies of superior officials." *Waters v. City of Morristown*, 242 F.3d 353, 362 (6th Cir. 2001) (citing *City of St. Louis*

v. Praprotnik, 485 U.S. 112, 127 (1988) (plurality opinion)). Second, the actions taken themselves, catalyzed in part by the Plaintiffs' complaint about carrying the pagers and rescinded in part after Plaintiffs complained about the removal of the flat rate mileage reimbursement, lack the sort of force and finality characteristic of official municipal policy. *Contra City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (City Council canceled license allowing concert because of dispute over content of performance); *Monell*, 436 U.S. at 658 (agencies' written policy compelling pregnant employees to take unpaid leaves of absence before such leaves were medically necessary deemed invalid).

Qualified Immunity

Plaintiffs complain that the district court erred in granting DeBeau qualified immunity from liability. As discussed above, DeBeau's position afforded him discretion in airport safety and management decisions. "Government officials who perform discretionary functions are generally entitled to qualified immunity and are protected from civil damages so long as 'their conduct does not violate clearly established statutory or constitutional

rights of which a reasonable person would have known.'" *Pray v. City of Sandusky*, 49 F.3d 1154, 1157 (6th Cir. 1995) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Plaintiffs here fail to establish a violation of a clearly established statutory or constitutional right. Moreover, because the allegedly adverse actions were taken either to benefit the Plaintiffs or for sound business reasons, a reasonable person in DeBeau's position would not have known that those same actions would violate Plaintiffs' rights. The district court correctly found DeBeau immune from liability.

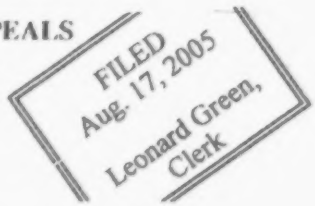
III. CONCLUSION

The district court properly concluded that the Plaintiffs failed to set forth a cause of action under the FLSA and failed to prove a claim of retaliation in violation of it; that Wayne County and the Airport Authority were not proper defendants pursuant to Plaintiffs' Section 1983 claim; and that Director of Safety DeBeau enjoyed qualified immunity from liability.

AFFIRMED.

Case Nº 04-2457

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



MICHAEL ADAIR (SWAT); WILLIAM CHILDRESS (K-9); LEON DENTON (K-9); CHARLES ELSTONE (K-9); RICHARD FREDERICK (K-9); RICHARD HITCH (AI); ERNEST HUNTER (SWAT); CHARLES JOHNSON (K-9); VICTOR KLINE (SWAT); JOHN MALANIAK (SWAT); MICHAEL MOLITOR (SWAT, EOD); PAUL MOLITOR (SWAT, EDO); PETER MOLITOR (SWAT, EDO); DAVID OKONEY (SWAT); DEAN PIGOTT (K-9); BRUCE PRESTON (K-9); MICHAEL TAVTIGIAN (K-9); JOHN TESCHKE (AI); ROBERT TIPTON (AI); AND BRADFORD VINCENT (AI),
Plaintiffs - Appellants,

v.

CHARTER COUNTY OF WAYNE, A MUNICIPAL CORPORATION; DETROIT METROPOLITAN WAYNE COUNTY AIRPORT AUTHORITY, A MUNICIPAL CORPORATION; MARK DEBEAU, INDIVIDUALLY AND IN HIS CAPACITY AS "DIRECTOR OF PUBLIC SAFETY"; KENT BOOTH, INDIVIDUALLY AND IN HIS CAPACITY AS "POLICE CHIEF" - AIRPORT POLICE DEPARTMENT, JOINTLY AND SEVERALLY,
Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
AT DETROIT

FINAL BRIEF OF THE APPELLANTS

Oral Argument Requested

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In the
UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Case No. 04-2457

MICHAEL ADAIR, WILLIAM CHILDRESS, LEON DENTON, CHARLES ELSTONE, RICHARD FREDERICK, RICHARD HITCH, ERNEST HUNTER, CHARLES JOHNSON, VICTOR KLINE, JOHN MALANIAK, MICHAEL MOLITOR, PAUL MOLITOR, PETER MOLITOR, DAVID OKONEY, DEAN PIGOTT, BRUCE PRESTON, MICHAEL TAVTIGIAN, JOHN TESCHKE, ROBERT TIPTON and BRADFORD VINCENT,
Plaintiffs-Appellants,

v.

CHARTER COUNTY OF WAYNE, DETROIT METROPOLITAN WAYNE COUNTY AIRPORT AUTHORITY, MARK DeBEAU and KENT BOOTH,
Defendants-Appellees.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to FRAP 26.1 and 6th Circuit Rule 26.1(a), Plaintiffs-Appellants, make the following disclosure:

1. Is said part a subsidiary or affiliate of a publicly-owned corporation? **NO.**

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? **NO.**

Dated: August 17, 2005

/s/ Jamil Akhtar (LG)
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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants request that oral argument be granted for this appeal, pursuant to Sixth Circuit Rule 34(a). Appellants believe that allowing the parties to present oral argument in this matter would greatly assist the Court in understanding the particular factual history of this case, and further, would greatly eliminate the legal issues raised in this appeal.

Oral argument will afford the Court the opportunity to pose any questions it may have concerning the facts or the specifics of the parties' respective positions. Appellants' counsel believes that participation in oral argument will be beneficial, and that the decisional process will be significantly aided by this Court's grant of oral argument. Justice Brennan once said that, "oral argument is the absolutely indispensable ingredient of appellate advocacy...[O]ften my whole notion of what a case is about crystallizes at oral argument." Robert L. Stern, *Supreme Court Practice*, pg. 671 (2002), quoting Brennan in Harvard Law School Occasional Pamphlet No. 9, 22-23 (1967). Justice Ginsberg has likewise explained that oral argument gives counsel "notice and a last clear chance to convince the Court concerning points on which the decision may turn." *Id.*, quoting Ginsburg, Address to the Dinner of

American Law Institute, 58 (5/19/94). Sixth Circuit Senior Judge Gilbert S. Merritt likewise recognized that the core of the adversary process is oral argument, a tradition which provides a "hedge against misdiagnosis and misperformance in the brief, the one last chance of locating a postern missed in the advance survey." Merritt, Judges on Judging: *The Decision-Making Process in Federal Courts of Appeal*, 51 Ohio St. L.J. 1385, 1386-1387 (1991).

STATEMENT OF SUBJECT MATTER & APPELLATE JURISDICTION

Federal court jurisdiction over the subject matter of this action is based upon the existence of federal questions arising under federal law, namely, the Fair Labor Standards Act, being 29 U.S.C. §201 et. seq., and violations of Appellants' rights as secured under the First Amendment of the United States Constitution, as otherwise actionable under 42 U.S.C. §1983.

Therefore, in accordance with 28 U.S.C. §1331, subject matter jurisdiction was properly vested in the Federal District Court below. Before that Honorable Court, Appellants' Complaint alleged a violation of their rights as secured under, and retaliation in violation of, the Fair Labor Standards Act, being 29 U.S.C. §201 et. seq. Appellants' Complaint further alleged a violation of their rights as secured under the First Amendment of the United States Constitution, as otherwise actionable under 42 U.S.C. §1983 (R. 55, 6/5/03, 3rd Amd Complaint; JA p. 53).

This Court now has appellate jurisdiction pursuant to 28 U.S.C. §1291. On October 15, 2004, the District Court, Honorable Denise Page Hood, entered a Memorandum Opinion and Order, and Judgment (R.78, 10/15/04, Memo

Opinion and Order; JA p. 73), (R.79, 10/15/04, Judgment; JA p. 95). Plaintiffs-Appellants then timely filed their Notice of Appeal from the decision on November 12, 2004 (R.82, 11/12/04, Notice of Appeal; JA p. 96).

STATEMENT OF ISSUES PRESENTED

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT APPELLANTS HAVE NOT SET FORTH A CAUSE OF ACTION UNDER THE FAIR LABOR STANDARDS ACT, AS OTHERWISE CONTAINED IN COUNT I OF THEIR COMPLAINT?

II. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING COUNTS II, IV, V AND VI OF APPELLANTS' COMPLAINT, AS APPELLANTS HAVE SET FORTH A CAUSE OF ACTION OF RETALIATION IN VIOLATION OF THE FLSA?

III. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT WAYNE COUNTY AND THE WAYNE COUNTY AIRPORT AUTHORITY ARE NOT PROPER DEFENDANTS PURSUANT TO APPELLANTS' COUNT III ALLEGING A VIOLATION OF 42 U.S.C. §1983?

IV. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANTS' CLAIMS AGAINST INDIVIDUAL DEFENDANT, MARK DeBEAU?

STATEMENT OF THE CASE

A. Nature of the Case:

Appellants, **MICHAEL ADAIR, WILLIAM CHILDRESS, LEON DENTON, CHARLES ELSTONE, RICHARD FREDERICK, RICHARD HITCH,ERNEST HUNTER, CHARLES JOHNSON, VICTOR KLINE,JOHN MALANIAK, MICHAEL MOLITOR, PAUL MOLITOR, PETER MOLITOR, DAVID OKONEY, DEAN PIGOTT, BRUCE PRESTON, MICHAEL TAVTIGIAN, JOHN TESCHKE, ROBERT TIPTON** and **BRADFORD VINCENT** (hereinafter individually referred to as "Appellant [Surname]") originally filed their lawsuit in 2002 in the United States District Court for the Eastern District of Michigan. The case was assigned to the Honorable Denise Page Hood. As filed, Appellants' 2002 Complaint alleged a violation of the Fair Labor Standards Act, being 29 U.S.C. §201 et. seq.(hereinafter "FLSA"), against Appellee, **CHARTER COUNTY OF WAYNE** (hereinafter "Appellee County") (R.1, 3/25/02, Complaint; JA p. 20).

Pursuant to Fed. R. Civ. P. 15(a), Appellants filed their First Amended Complaint before Appellees responsive

pleadings had been served. Said First Amended Complaint added as Defendants, Appellees, **DETROIT METROPOLITAN WAYNE COUNTY AIRPORT AUTHORITY** (hereinafter "Appellee Airport Authority"), **MARK DeBEAU** (hereinafter "Appellee DeBeau") and **KENT BOOTH** (hereinafter "Appellee Booth"). Said First Amended Complaint also added counts of retaliation in violation of the FLSA, as well as a violation of their rights as secured under the First Amendment of the United States Constitution, as otherwise actionable under 42 U.S.C. §1983 (R.4, 4/30/02, 1st Amd Complaint; JA p. 26).

Then again in early-June, 2002, Appellants filed their Second Amended Complaint, pursuant to Fed. R. Civ. P. 15(a), adding two more counts of retaliation in violation of the FLSA (R.8, 6/12/02, 2nd Amd Complaint; JA p. 37).

Appellants were granted leave to file their Third Amended Complaint in June, 2003, to include additional counts of violations of, and retaliation in violation of, the FLSA, as well as additional counts of violations of their rights as secured under the First Amendment of the United States Constitution, as otherwise actionable under 42 U.S.C. §1983 (R.55, 6/15/03, 3rd Amd Complaint; JA p. 53).

B. Course of Proceedings:

Appellees filed their Motions for Summary Judgment in the spring of 2003 (R.51, 5/30/03, DeBeau & Booth Mtn Summ Judg; JA p. 184), (R.53, 6/2/03, Defs' Mtn Summ Judg; JA p. 207). Appellants responded to both Motions during the summer of 2003 (R.60, 6/25/03, Resp DeBeau & Booth's Mtn Summ Judg; JA p. 530), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg; JA p. 680).

C. Disposition of Case Below:

Oral arguments by the parties, relative to Appellees' Motions for Summary Judgment, were heard before the Honorable Denise Page Hood in the United States District Court in Detroit on August 6, 2003, and the court determined to take the Motions under advisement, issuing a written ruling at a later date (TR, 8/6/03, Hearing transcript Mtns Summ Judg; JA p. 954). In a Memorandum Opinion and Order dated October 15, 2004, Judge Denise Page Hood dismissed all of Appellants' causes of action and an appeal proceeded (R.78, 10/15/04, Memo Opinion and Order; JA p. 73), (R. 79, 10/15/04, Judgment; JA p. 95), (R. 82, 11/12/04, Notice of Appeal; JA p. 96).

STATEMENT OF THE FACTS

1. AIRPORT POLICE DEPARTMENT:

Members of the Airport Police Department, approximately 150 employees, have transfer rights to and from the Wayne County Sheriff's Department, pursuant to their collective bargaining agreements.

A police officer assigned to the Wayne County Sheriff's Department can exercise his/her seniority rights and either transfer to a position at the Airport, or be promoted to said position (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 1, Local 502 Contract, pp. 30-39; JA pp. 729-738). The sergeants and lieutenants at the Airport likewise have the same transfer rights, as said rights are contained in their respective collective bargaining agreement with Wayne County (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 3, Local 3317 Contract, pp. 35-41; JA pp. 748-754). Therefore, a member of the Airport Police Department can be employed by the Airport Authority on one day and the very next day be transferred to the Wayne County Sheriff's Department and be an employee of Wayne County. All employees of the Airport Police Department were originally employees of the Wayne County Sheriff's Department and, under the terms of the

collective bargaining agreements, can return to the Sheriff's Department at any time (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 1, Local 502 Contract; JA p. 726), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 3, Local 3317 Contract; JA p. 745).

2. APPELLANTS ARE MEMBERS OF FOUR SPECIALTY UNITS:

The Airport Police Department has several specialty units which are comprised of both command officers and police officers. The four (4) specialty units which are the subject of this litigation are the Special Response Unit (hereinafter "SRU-SWAT"), Explosive and Ordinance Disposal Unit (hereinafter "EOD-Bomb Squad"), K-9 Unit (hereinafter "K-9") and Accident Investigation Unit (hereinafter "AI Unit").

The selection of SRU Unit officers is regulated by a general order (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 4, General Order re: SRU-SWAT; JA p. 759). A special general order likewise regulates the selection of officers in the EOD Unit. The special order also requires the officers to live within a close geographical area to the Airport and therefore, restricts their ability to live where they choose. (R.76,

8/18/03, Resp Defs' Mtn Summ Judg, Ex. 5, General Order re: EOD; JA p. 771).

Officers assigned to the K-9 Unit are assigned a dog, which is referred to as to the officer's partner, and undergo twelve (12) weeks of extensive training by the United States Army. Selection of the officers in the K-9 Unit is similarly controlled by a general order which restricts the officers' ability to live where they choose (R.76,8/18/03, Resp Defs' Mtn Summ Judg, Ex. 6, General Order re: K-9;JA p. 774).

The officers of the Accident Investigation - AI Unit are specially trained in accident investigation and accident reconstruction, and likewise have a general order setting forth their duties and training requirements (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 7, General Order re: AI; JA p. 777).

In 1998 and 1999, the Department made arrangements to secure digital pagers which operated on a state-wide basis for each of the officers assigned to the four specialty units (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 8, Dunbar Dep, pp. 9-10; JA pp. 787-788).

In 1994 and 1995, during the period of time that the officers assigned to the specialty unit had the old-style analog pagers, Executive Lt. Carl Michalski put out written orders

stating that the pagers were to be carried both on and off-duty and always turned-on (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 9A, 3/30/94 Order; JA p. 791), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 9B, 7/29/96 Order; JA p. 793). Executive Lt. Michalski testified that the two orders constituted an order for which an officer could be disciplined if same was violated (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 10, Michalski Dep, pp. 13-14; JA pp. 797-798).

Lt. William Dunbar testified that the officers assigned to the SRU-SWAT Unit are required to have their pagers on twenty-four hours a day, seven days a week, and that he, in fact, has disciplined an officer who he tried to contact and said officer did not respond to his page (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 8, Dunbar Dep, pp. 13-14; JA pp. 788-789). Appellant Lt. Denton stated that the officers assigned to the K-9 Unit, under his command, were required to respond to calls for services at all hours (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 6, General Order re: K-9; JA p. 774), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 11, Lt. Denton Affidavit; JA p. 799).

3. APPELLANTS WERE SUBJECT TO BEING ON-CALL:

Officers assigned to the K-9 Unit, as a condition of being considered for selection to the Unit, had to agree that they would respond to calls for service at all hours (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex.6, General Order re: K-9, p. 1; JA p. 776). The EOD-Bomb Disposal officers, as a condition of employment, had to agree that they must be willing to respond to calls for service at all hours (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 5, General Order re: EOD; JA p. 771). Likewise, the officers assigned to the SRU-SWAT Unit are required to participate in all activities of the Unit, are subject to being removed from the Unit if they do not respond to SRU Unit training activities, and if they miss more than two training call-outs per year (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 4, General Order re: SRU-SWAT Unit, pp. 3 & 11; JA pp. 762, 770).

4. APPELLANTS WERE RESTRICTED TO A GEOGRAPHICAL AREA WHEN THEY WERE OFF-DUTY:

Members of the K-9 Unit, as a condition to being chosen for the position, had to live in a geographical area that

was within a thirty-minute travel time from Metropolitan Airport (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 6, General Order re: K-9, p. 2; JA p. 775). EOD officers likewise had to agree, as a condition of being assigned to the Bomb Disposal Unit, that they would live within thirty-minutes travel from the Airport (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 5, General Order re: EOD Unit, p. 2; JA p. 773).

SRU team members are required to maintain a reasonable availability when off-duty, and this is almost mandatory during times of special risk (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 4, General Order re: SRU-SWAT, p. 3; JA p. 762).

5. **EXCEPT FOR THE PERIOD IMMEDIATELY FOLLOWING SEPTEMBER 11, 2001, APPELLANTS GENERALLY COULD ATTEND TO THEIR PERSONAL BUSINESS WHILE OFF-DUTY, SUBJECT TO RESPONDING WHEN PAGED BY THE DEPARTMENT:**

After September 11, 2001, all Appellants were placed on twelve-hour shifts, working seven days per week, and had their leave and vacation days canceled. This lasted until September 21, 2001, when the officers were placed on ten-

hour shifts, worked six days per week and still had their vacation time canceled. On November 26, 2001, the officers went on a five-day per week schedule, ten hours per day, and were finally allowed to use their vacation time.

On September 11, 2001, the members of the SWAT Unit, K-9 Unit and EOD Unit were divided evenly on two shifts. The officers were told that, when they were off-duty, they had to stay close to home and be able to respond immediately should the need arise. This continued until approximately November 26, 2001, when Appellants went on a five-day per week, ten hour per day work schedule. Appellants were instructed as follows:

- Appellant Adair testified that, on September 11, 2001, he was ordered by the SWAT sergeants to stay close to home when he was off-duty (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 12, Adair Dep, pp. 67-68; JA p. 804).
- Appellant Childress testified that, on September 11, 2001 while he was off-duty, he was ordered by his command officer to stay home in case he needed to be reached (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 13, Childress Dep, pp. 54-55; JA p. 809).

- A former Plaintiff in this matter, Brett Michalski, was told to make himself available, as he might be called back at any time (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 17, Brett Michalski Dep, p. 30; JA p. 823).
- Appellant Elstone testified that, on September 11, 2001, his lieutenant, Appellant Lt. Denton, told him to stay at home while he was off-duty so that he could be contacted if necessary (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 14, Elstone Dep, pp. 39-40; JA p. 812).
- Appellant Johnson testified that, after September 11, 2001, he was required to stay at home while off-duty, or be subject to discipline (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 15, Johnson Dep, pp. 15-16; JA p. 815).
- Appellant Hunter testified that, on September 11, 2001, Executive Lt. Stephen Koester ordered him to stay at home while off-duty and, if he was needed, the Department would contact him (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 16, Hunter Dep, pp. 23-24; JA p. 819).

- Former Plaintiff, Brett Michalski, testified that the members of the SRU-SWAT Unit were given an order to make themselves available during off-duty hours directly following September 11, 2001 (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 17, Brett Michalski Dep, pp. 15-16; JA p. 822).
- Appellant Paul Molitor testified that, following September 11, 2001, Executive Lt. Carl Michalski ordered him to go home and stay by the phone. It was Lt. Michalski who divided the K-9 and EOD officers up on the two shifts (R.76,8/18/03, Resp Defs' Mtn Summ Judg, Ex. 18,Paul Molitor Dep, pp.11-12; JA p. 826).
- A former Plaintiff, Sgt. Michael Wasiukanis, testified that, after September 11, 2001, he was restricted to his home while off-duty, and could not engage in his normal personal off-duty activities. Sgt. Wasiukanis testified that it was Executive Lt. Stephen Koester who ordered him to stay at home and be by the phone (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 19, Wasiukanis Dep, pp. 13-15; JA pp. 829-830).
- Appellant Pigott testified that Executive Lt. Koester called him at home and ordered him to report to work

at 6:00 p.m. on September 11, 2001, but that he was to remain home until that time in case he was needed before 6:00 p.m. (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 20, Pigott Dep, pp. 18-20; JA p. 833).

6. APPELLANTS WERE SUBJECT TO DISCIPLINE IF THEY FAILED TO COME TO WORK WHEN PAGED WHILE OFF-DUTY.

Lt. William Dunbar testified that he disciplined an officer who did not report to duty when paged (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 8, Dunbar Dep, pp. 13-14; JA pp. 788-789).

Executive Lt. Carl Michalski testified that he put out two orders requiring the officers to carry their pagers both on and off-duty, and that, if the officers did not respond to their page, they would be subject to discipline (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 9A, 3/30/94 Order; JA p. 791), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 9B, 7/29/96 Order; JA p. 793), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 10, Michalski Dep, pp. 13-14; JA pp. 797-798).

Some of the Appellants were, in fact, disciplined for not responding to a page while off-duty:

- Appellant Elstone testified that he was disciplined for not responding when paged (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 21, Elstone's Answers to Interr; JA p. 834).
- Appellant Peter Molitor, testified that he was disciplined by Executive Lt. Michalski when he did not answer a page (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 22, Peter Molitor Dep, pp. 50-51; JA p. 841).
- Appellant Tipton testified that he was disciplined by Executive Lt. Koester when he did not respond to a page (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 23, Tipton Dep, pp. 20-21; JA p. 844).

Appellants further testified of the common knowledge, as it relates to being subject to discipline for not responding to an off-duty page, as outlined in the orders issued by Executive Lt. Carl Michalski ordering same: (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 9A, 3/30/94 Order; JA p. 791), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 9B, 7/29/96 Order; JA p. 793).

- Former Plaintiff, Brett Michalski, testified that officers could be disciplined if they did not follow the orders, and he considered anything in writing signed

by a lieutenant to be a direct order (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 17, Brett Michalski Dep, pp. 30-31; JA p. 823).

- Appellant Childress also testified that, if he did not respond to his pager, he would be subject to disciplinary action (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 13, Childress Dep, pp. 49-50; JA pp. 807-808).

7. **IN RETALIATION FOR FILING A LAWSUIT AND NAMING MARK DeBEAU AS A DEFENDANT, DeBEAU ELIMINATED THE K-9 OFFICERS' FLAT-RATE MILEAGE ALLOWANCE:**

Appellants filed their First Amended Complaint with the District Court on April 30, 2002, naming Appellee DeBeau as an individual Defendant (R.4, 4/30/02, 1st Amd Complaint; JA p. 26). On May 17, 2002, Appellee DeBeau, eleven days after receiving a copy of the lawsuit naming him as a Defendant, retaliated against the officers in the K-9 Unit by eliminating their monthly flat-rate mileage allowance and forcing them to drive home a County-owned marked police vehicle (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 24, 5/17/02 Order; JA p. 845). Appellee Booth testified that he

argued against taking away the flat-rate mileage allowance and requiring the officers to drive their police dogs to and from the Airport in a County-owned automobile. (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 25, Booth Dep, pp. 57-59; JA pp. 855-856)

The K-9 officers testified that, as a result of the retaliation, they lost several hundred dollars per month in flat-rate mileage. (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 15, Johnson Dep, pp. 23-24; JA p. 816), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 26, Frederick Dep, pp. 43-45; JA p. 859).

8. TEN DAYS AFTER BEING SERVED WITH THE FIRST AMENDED COMPLAINT AND WAIVER OF SERVICE OF SUMMONS, APPELLEE DeBEAU ELIMINATED THE APPELLANTS' ABILITY TO EARN AND USE COMP TIME:

On May 16, 2002, Appellee DeBeau ordered Chief of Police, Appellee Booth, to notify the members of the special units that they would no longer be allowed to earn comp time (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 31, 5/16/02 Memorandum; JA p. 889). It is interesting to note the

wording used by Appellee Booth in the beginning of his memorandum:

> "**THE AIRPORT ADMINISTRATION HAS DISCONTINUED THE COMPENSATORY TIME PROGRAM WITHIN THE POLICE DEPARTMENT**."[Emphasis added] (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 31, 5/16/02 Memorandum; JA p. 889)

What Appellee Booth was, in fact, telling the officers by this sentence was that this was a decision made by Appellee DeBeau, not Appellee Booth.

Most, if not all, of the comp time was earned by officers in the SWAT Unit, EOD Unit, K-9 Unit and Accident Investigation Unit. The officers received the comp time in lieu of overtime for training purposes. Therefore, the elimination of the comp time, for all intents and purposes, only affected the Appellants in this lawsuit (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 22, Peter Molitor Dep, pp. 39, 47-49; JA pp. 839-840).

Appellee DeBeau's reason for eliminating the comp time was because it was costing the County too much money in overtime to replace the officers when they utilized their comp time (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex.

28, DeBeau Dep, pp. 32-35, 42-59; JA pp. 875-876, 877-881). However, it was pointed-out to Appellee DeBeau during his deposition that the officers primarily used their comp time in lieu of utilizing their banked vacation time. Under the Union contract, officers are paid-off for their excess vacation time once per year (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 1, Local 502 Contract, pp. 52-54; JA pp. 740-742). Article 20, Section 20.03(B) provides for the pay-off of annual leave in excess of one-hundred and sixty (160) hours on November 1st annually. The collective bargaining agreement between Wayne County and the Sergeants' & Lieutenants' Union (Local 3317), provides for the same pay-off, except that the pay-off will be in excess of one-hundred and twenty (120) hours of accumulated annual leave (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 3, Local 3317 Contract, pp. 54-56; JA pp. 756-758).

Appellee DeBeau's answer, that the utilization of the comp time by the officers caused the Department to pay overtime to those employees who had to replace the officers who were off on comp time, is absolutely not true. General Order No. 8340, entitled "Compensatory Time Off", specifically prohibits the use of comp time if it creates overtime. General Order No. 8340.20 provides as follows:

"8340.20 **Requests to Use Compensatory Time:** Requests to utilize compensatory time shall be submitted to the employees' supervisor on the "compensatory time off request" form. Approval to use compensatory time shall be granted if the use does not unduly disturb the operation of the shift/unit.

Use of compensatory time may be denied if it creates overtime. Every reasonable effort will be made to honor the employee's request" (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 35, General Order 8340; JA p. 906).

Appellee DeBeau's stated, legitimate, business reason as to comp time is not to be believed.

9. AFTER FILING THE COMPLAINT, ONLY MEMBERS OF THE SRU-SWAT UNIT, EOD-BOMB DISPOSAL UNIT AND AI-ACCIDENT INVESTIGATION UNIT HAD THEIR PAGERS TAKEN AWAY FROM THEM:

Appellees collected the pagers only from Appellants and, days later, collected the pagers from the rest of the officers at the Airport. A former Plaintiff, Sgt.Mark Bonza, was ordered by his superior to collect the pagers from the police officers who were Plaintiffs in this lawsuit and no one else (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 27, Bonza Dep, pp. 25-30; JA pp. 862-864). Further, Lt. Dunbar

testified that Appellee DeBeau did not take away the pagers from the Airport firefighters who were members of the SRU-SWAT Unit. Lt. Dunbar further testified that, to his knowledge, all of the Airport firefighters continue to have pagers as of this date (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 8, Dunbar Dep, pp. 24-25; JA p. 790).

Appellee DeBeau testified that a reason he collected the pagers after the lawsuit was filed was for the purpose of cutting his losses in the event Appellants prevailed in their lawsuit (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 28, DeBeau Dep, p. 26; JA p. 874).

SUMMARY OF ARGUMENTS

The District Court incorrectly granted Appellees' Motions for Summary Judgment. First, Appellants are able to show that they were severely restricted due to the fact they were subject to discipline if they failed to respond. Appellants being subject to discipline is a logical extension of C.F.R. 553.221(c) and (d), and this Court's reasoning in *Martin v. Ohio Turnpike Commission*, 968 F2d 606 (6th Cir, 1992) and *Aiken, et al v. City of Memphis, Tennessee*, 190 F3d 753 (6th Cir, 1999). Further, the on-call requirements are compensable under the FLSA, as the restrictions are onerous as envisioned by this Court in *Martin, supra* and *Aiken, supra.* The fact that Appellants are subject to discipline, brings them under the overtime provision of the FLSA, and this is a matter of first impression before this Honorable Court.

For the eleven weeks following September 11, 2001, Appellants were severely restricted as to their ability to engage in private, non-duty activities and overtime is appropriate under the facts of this case.

After filing their initial Complaint, Appellants were subject to retaliatory treatment in violation of 29 U.S.C. §215(a)(3).

Lastly, Appellants were retaliated against by the individual Appellees and the Airport Authority after they filed their Complaint which expressed matters of public concern, and which are actionable under 42 U.S.C. §1983.

ARGUMENTS

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT APPELLANTS HAVE NOT SET FORTH A CAUSE OF ACTION UNDER THE FAIR LABOR STANDARDS ACT, AS OTHERWISE CONTAINED IN COUNT I OF THEIR COMPLAINT:

A. Standard of Review:

The Court of Appeals reviews de novo a district court's grant of summary judgment. See *Allen v. Michigan Dep't of Corrections*, 165 F.3d 405, 409 (6th Cir. 1999). Summary Judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view all of the evidence, and any inferences that may be drawn from that evidence, in the light most favorable to the nonmoving party. See *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

B. Argument:

Appellants are police officers of the Detroit Metropolitan Wayne County Airport assigned to the SRU-SWAT Unit, EOD-Bomb Disposal Unit, K-9 Unit and AI-Accident Investigation Unit. The individual officers' assignments are as follows:

SRU-SWAT UNIT	Appellant Adair Appellant Hunter Appellant Kline Appellant Malaniak Appellant Michael Molitor Appellant Okoney
K-9 UNIT	Appellant Childress Appellant Lt. Denton Appellant Elstone Appellant Frederick Appellant Johnson Appellant Pigott Appellant Preston Appellant Tavtigian
EOD-BOMB DISPOSAL UNIT	Appellant Paul Molitor Appellant Peter Molitor

AI-ACCIDENT INVESTIGATION UNIT

Appellant Hitch
Appellant Teschke
Appellant Tipton
Appellant Vincent

In Count I of their Complaint, Appellants allege that they are entitled to overtime compensation for the period of time that they were on-call as members of the specialized units as above set forth (R.55, 6/5/03, 3rd Amd Complaint; JA p. 53).

Section 207 of the FLSA requires an employer to pay its employees at a rate of time-and-a-half for all hours worked in excess of forty hours in one work week. The U.S. Department of Labor has issued a C.F.R. setting forth under what circumstances an employee can be paid for time spent away from the employer's premises.

29 C.F.R. 553.221, sub-parts (c) and (d) are applicable to Appellants' cause of action, and provide as follows:

> "(c) Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work. For example, where a police station

must be evacuated because of an electrical failure and the employees are expected to remain in the vicinity and return to work after the emergency has passed, the entire time spent away from the premises is compensable. The employees in this example cannot use the time for their personal pursuits.

(d) An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working wile on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable" (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 29, 29 C.F.R. 553.221).

The Sixth Circuit Court of Appeals has, on at least two occasions, dealt with the issue of request by employees for overtime pay while they were serving in an on-call status.

See *Martin v. Ohio Turnpike Commission*, 968 F2d 606 (6th Cir, 1992) and *Aiken, et al v. City of Memphis, Tennessee*, 190 F3d 753 (6th Cir, 1999). In *Martin*, this Court held that, under the appropriate fact situation, and, after reviewing the law of the other circuits, on-call time spent at home may be compensable if the restrictions imposed are so onerous as to prevent employees from effectively using the time for personal pursuits. The employee must show that the on-call policy imposes additional burdens that seriously interfere with the employee's ability to use the time for personal pursuits. (*Martin, supra* at 611)

Further, the *Martin* court made specific reference to the plaintiffs' position that, under the Eighth Circuit holding in *Cross v. Arkansas Forestry Commission*, 938 F2d 912 (8th Cir, 1999), one of the facts which was taken into consideration was the employer's requirement that its employees monitor hand-held radios during on-call periods. (*Martin* at 610) The Airport general order regulating the conduct of the SRU-SWAT Unit employees requires those officers to have their police radios with them at all times while off-duty (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 4, General Order re: SRU-SWAT, p. 5; JA p. 764).

This Court in *Martin* made reference to the Tenth Circuit's decision in *Renfro v. City of Emporia*, 948 F2d 1529 (10th Cir, 1999), wherein the Tenth Circuit approved overtime pay for firefighters who were on-call for twenty-four hour periods during which they were required to carry pagers and return to work within twenty minutes of being paged. The Tenth Circuit, in *Renfro, supra,* relied upon the specific facts of that case in awarding overtime.

The *Martin* court also made specific reference to the plaintiffs' brief, wherein the plaintiffs pointed-out in *Owens v. ITT Rayonier*, 1990 U.S. Dist. LEXIS 18715 (W.D. Wash. September 26, 1990), that the court ordered the payment of overtime for on-call time where the employee was subject to discipline if they failed to respond. (*Martin* at 610-611)

This Court's decision in *Aiken, supra*, is enlightening in that it sets forth the law which is to be followed in determining whether or not employees are entitled to overtime for periods of time that they are on-call. The *Aiken* Court, in addressing this issue, stated as follows:

> "Generally speaking, the FLSA requires employers to compensate an employee at a rate of pay not less then one and one-half times the employee's normal rate of pay for

hours the employee works above the statute's applicable maximum workweek. See 29 U.S.C. §207(a). Under certain circumstances, employer restrictions on what is ostensibly an employee's free time can cause such time to count as hours worked. See 29 C.F.R. §553.221(c),(d). The question confronting this Court is analogous to that posed by cases considering the compensability of "on-call" time. n7 An employer must compensate an employee for time spent "predominantly for the employer's benefit". *Martin v. Ohio Turnpike Comm'n*, 968 F2d 606, 609 (6th Cir, 1992) (citing *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 89 L. Ed. 118, 65 S. Ct. 165 (1944)); ~~see also~~ 29 C.F.R. §553.221(c),(d). In other words, the question in on-call cases is whether the employer's restrictions on officers' time "prevent the employees from effectively using the time for personal pursuits." *Martin*, 968 F2d at 611. "That some of the plaintiffs' personal activities may have been affected is not enough." *Id.* In making this determination, the Court examines "all the circumstances of the case." *Id.* at 609 (internal quotes omitted). "An employee's free time must be severely restricted for off-time to be construed as work time for purposes of the FLSA." See *Dade County v. Alvarez*, 124 F3d 1380, 1384 (11th Cir, 1997) (internal quotes omitted), *cert. den'd*, 523 U.S. 1122, 118 S. Ct. 1804, 140 L. Ed. 2d 943 (1998).

n7 An on-call employee leaves the employer's premises "with the understanding that he or she is expected to return to work" if called in. 29 C.F.R. §553.221" (*Aiken* at 760-761)

The question then becomes, based upon all the circumstances of the case, is the Appellants' free time severely restricted, and therefore, "work time" for the purpose of the FLSA?

1. APPELLANTS ARE SUBJECT TO DISCIPLINE FOR NOT RESPONDING WHEN CALLED:

At pages 8-9 of its Memorandum Opinion and Order, the District Court set forth the court's reasoning as to why the discipline imposed, and the possibility of discipline to be imposed, did not rise to the level of a severely-restricted activity by the employer which would cause Appellants to be awarded overtime under the FLSA. The District Court reasoned that, in *Martin, supra*, this Honorable Sixth Circuit Court of Appeals made its decision not to award overtime under the FLSA because the Authority took disciplinary action sixty-nine times in a three-year period for failure to respond. The District Court's Opinion would lead to the conclusion that the ability to discipline an officer must be

weighed by the amount of discipline imposed, and not just the threat of discipline (R.78, 10/15/04, Memo Opinion and Order, pp. 8-9; JA p. 80-81).

The District Court further states at page 8:

> "In this case, only three of the Plaintiffs claim to have been disciplined. Two of these incidents occurred while they were "on duty" and being paid. The third admitted he was verbally counseled and testified in his Answers to Interrogatories that he was not disciplined but at his deposition, claimed he was disciplined....The disciplinary actions in this case, if any, do not come close to the 69 times noted in the *Martin* case. The Sixth Circuit rejected the disciplinary argument in *Martin*. *Martin*, 968 F2d at 612" (R.78, 10/15/04, Memo Opinion and Order, p. 8; JA p. 80).

What the District Court, in fact, is saying is that an officer is free to disregard a direct order from his or her superiors as it relates to making himself or herself available to respond at a moment's notice. Lt. Carl Michalski, Lt. William Dunbar and Appellee Leon Denton (likewise a lieutenant), all testified that the officers were subject to discipline if they did not respond. This argument is set forth in greater detail below. The District Court clearly erred in

looking at the number of times discipline was meted-out in determining whether or not discipline is a factor that severely restricts an officer's use of their off-duty time.

It would appear that, whether or not an employer's ability to discipline an employee who fails to respond when called-in does, in fact, constitute a severe restriction of the employee's personal time as otherwise set forth under 29 C.F.R. §553.221(c) and (d). This Honorable Court has not issued a published decision which dealt with this issue of discipline in the past; however, this Court did, apparently, approve of using the fact that an employee could be disciplined if he or she failed to respond as a way of allowing the plaintiff to prove that he or she was severely restricted. This Honorable Court, in *Martin, supra*, stated as follows:

> "The plaintiffs also point to the unpublished decision in *Owens v ITT Rayonier*, No. C88-533T, 1990 U.S. Dist. LEXIS 18715 (W.D. Wash. Sept. 26, 1990), *appeal docketed*, No. 91-35409 (9th Cir, 1991). In *Owens*, the court entered judgment against a pulp mill that promulgated a policy that imposed discipline against any mechanic who missed an unspecified number of call-in attempts. The court concluded that the mechanics' obligation to respond to pages prevented them from using the time for their own purposes.

> As the Turnpike points out, the *Owens* decision cites no cases and contains no legal analysis to support its decision." (*Martin* at 610-611)

It is Appellants' position that the imposition of discipline for the their failure to respond when paged constitutes a severe restriction on their off-time and therefore, invokes the overtime provisions of the FLSA. Lt. William Dunbar testified that he has disciplined officers for not responding to a page (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 8, Dunbar Dep, pp. 13-14; JA pp. 788-789). Further, Appellee Lt. Denton, the lieutenant in charge of the day-to-day operations of the K-9 Unit, stated that an officer who does not respond to his page was subject to discipline under the Airport disciplinary policy (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 11, Lt. Denton Affidavit; JA p. 799).

Executive Lt. Carl Michalski put out two orders requiring the officers to have their pagers on at all times (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 9A, 3/30/94 Order; JA p. 791), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 9B, 7/29/96 Order; JA p. 793). These orders have

never been revoked and constitute orders punishable by discipline if not followed!

Lt. Michalski also testified during his deposition that the two general orders constituted direct orders from a superior officer and that, if the members of the special units did not respond to pages, they were subject to discipline (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 10, Michalski Dep, pp. 13-14; JA pp. 797-798).

Officers assigned to the SRU-SWAT Unit would be removed from the Unit if they missed two call-in training exercises in a one-year period (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 4, General Order re: SRU-SWAT; JA p. 759).

Over the years, many of the officers assigned to the specialty units, for one reason or another, did not respond when paged and were disciplined. Appellees Elstone, Peter Molitor and Tipton all testified that they were disciplined for not responding (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 21, Elstone's Answers to Interr; JA p. 834), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 22, Peter Molitor Dep, pp. 50-51; JA p. 841), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 23, Tipton Dep, pp. 20-21; JA p. 844).

In *Pabst, et al v Oklahoma Gas & Electric Co*, 228 F3d 1128 (10th Cir, 2000), the court specifically took into consideration, in awarding overtime pay for on-call time spent by employees of Oklahoma Gas & Electric Company, the fact that, "failure to respond within the time limits was grounds for discipline." (*Pabst* at 1131)

2. MEMBERS OF THE SPECIAL UNITS WERE RESTRICTED AS TO WHERE THEY COULD LIVE:

The District Court, at pages 8-10 of its Memorandum Opinion and Order, admits that some of the officers were restricted as to their ability to live in an area of their choosing (R.78, 10/15/04, Memo Opinion and Order, pp. 8-10; JA pp. 80-82). The officers assigned to the K-9 Unit, EOD Unit and SRU-SWAT Unit had to be able to respond within a 20-30 minute time period from their homes when paged.

What we now have are two requirements which severely restrict many of the officers' rights which they cannot exercise, but said rights are available to all other police officers at the Airport. (1) The officers are subject to discipline if they do not respond when paged, and (2) Most of the officers are restricted as to where they can choose to live.

Members of the EOD-Bomb Disposal Unit, as a condition of being selected, had to agree to live within a certain geographical area in order to be able to respond quickly when paged to the Airport (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 5, General Order re: EOD, p. 2; JA p. 773).

Further, officers assigned to the K-9 Unit, whose dogs were required to search for explosives and narcotics at the Airport, were likewise required, as a condition of being assigned to the Unit, to live within a certain geographical area that would allow them to respond quickly when paged (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 6, General Order re: K-9 Unit, p. 2; JA p. 775).

Officers assigned to the SRU-SWAT Unit were required to have their police radios with them at all times and the police radios had coverage within Wayne County only (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 4, General Order re: SRU-SWAT, p. 2; JA p. 761).

Therefore, officers assigned to the specialized units were severely restricted as to their location in a designated geographical area and, because of this severe restriction, are entitled to compensation under the Act. See *Cross*, *supra* and *Owens*, *supra*.

The District Court concluded its argument by stating:

> "The test under FLSA is not whether Plaintiffs are restricted as to where they can live but whether their time, off duty or while on call, is predominantly for the employer. *Rutlin*, 220 F3d at 743. Plaintiffs have not shown that while off duty, they have been unable to engage in their personal activities and that such time off has been predominantly for the employer" (R.78, 10/15/04, Memo Opinion and Order, p. 11; JA p. 83).

Appellants respectfully argue that this is the wrong standard. The issue is not, "..that such time off has been predominantly for the employer", but whether or not the employer exercises control over the officers while they are off duty.

3. **FOR A PERIOD OF TIME AFTER SEPTEMBER 11, 2001, APPELLANTS WERE RESTRICTED TO THEIR HOMES WHILE OFF-DUTY:**

The District Court, in addressing whether or not the officers were restricted to their homes for an eleven-week period after September 11, 2001, states:

> "Although Plaintiffs were restricted from traveling during the few months after September 11, there were no restrictions on any personal activities while at home or near

> home. Plaintiffs have not cited any testimony that during this period Plaintiffs were actually paged or called in to work. Plaintiffs have not shown that they had "severe restrictions" on their personal time in order to survive summary judgment. *Martin* 968 F2d at 611" (R.78, 10/15/04, Memo Opinion and Order, p. 12; JA p. 84).

The District Court makes this statement after citing the testimony of several of the officers as to how they were restricted, and the fact that they were ordered by their superior officers to stay home. The District Court has engaged in impermissible fact-finding in determining that a jury would find that the officers were not entitled to overtime under the FLSA for the eleven-week period that the order encompassed.

On September 11, 2001, the entire Airport police operation was placed on twelve-hour shifts and the employees' leave days, vacation days and personal business days were cancelled. The officers assigned to the K-9 Unit, EOD-Bomb Disposal Unit and SRU-SWAT Unit were instructed that they were required to stay home during their off-duty hours, as they were subject to immediate recall at any time (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 12, Adair Dep, pp. 67-68; JA p. 804), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 13, Childress Dep, pp. 54-55; JA p.

809), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 17, Brett Michalski Dep, p. 30; JA p. 823). Also, Appellants would refer the Court back to subsection 5 of their Statement of the Facts for a complete list of testimony.

This restriction, as to the Appellants' ability to engage in personal activities, lasted for approximately eleven weeks through November 26, 2002 (9/11/01 to 9/20/01 = 12 hours per day, 7 days per week – 9/21/01 to 11/26/01 = 10 hours per day, 6 days per week).

The United States Supreme Court in *Skidmore v. Swift & Co*, 323 U.S. 134 (1944) stated that, cases under the FLSA must be decided on a case-by-case basis, based upon the facts of the particular case.

In the case at bar, Appellants' time away from their employer's premises was severely restricted.

Lastly, from September 11, 2001 to November 26, 2001, Appellants were ordered to stay at home during their off-duty hours and be ready to respond when paged. After working twelve-hours per day, and needing eight hours for sleep, the officers did not have any time for personal business when the Court takes into consideration their commuting time to and from work.

WHEREFORE, Appellants respectfully request that this Honorable Court of Appeals reverse the order of the District Court in dismissing their cause of action under Section 207 of the FLSA, and further, to find that Appellants are entitled to compensation at a rate of time-and-a-half as otherwise provided for under 29 C.F.R. §553.221(c) and/or (d).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING COUNTS II, IV, V AND VI OF APPELLANTS' COMPLAINT, AS APPELLANTS HAVE SET FORTH A CAUSE OF ACTION OF RETALIATION IN VIOLATION OF THE FLSA:

A. Standard of Review:

Appellants hereby rely upon the "Standard of Review" set forth in their Argument I above.

B. Argument:

The District Court, in its Memorandum Opinion and Order, stated that Appellants met their burden under the first two factors of proving a prima facie case of retaliation, however, the District Court went on to state that Appellants cannot show an adverse employment action that is "materially

adverse" (R.78, 10/15/04, Memo Opinion and Order, pp. 13-14; JA pp. 85-86). The District Court totally disregards the incontrovertible testimony of Appellants in this regard, and of Appellee DeBeau where he stated that he took some of the action to "**cut his losses**" (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 28, DeBeau Dep, p. 26; JA p. 874). The factual background is as follows. In the face of direct testimony from Appellee DeBeau, that a reason he took the pagers way from Appellants was to eliminate the possibility of additional damages if the Plaintiffs prevailed in this FLSA-lawsuit, the Court granted Appellees' Motion for Summary Judgment (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 28, DeBeau Dep, pp. 26-27; JA p. 874).

Appellants' claims of retaliation are founded under the anti-retaliation provisions of the FLSA, that being 29 U.S.C. §215(a)(3), which provides as follows:

> **"§215. Prohibited acts; prima facie evidence**
>
> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person --...
>
> **(3)** to discharge or in any other manner discrimination against any employee because such employee has filed any complaint or

> instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;.."

The District Court concluded this portion of its decision by stating that there is no causal connection between the filing of the Complaint and the actions taken by Appellee DeBeau. The District Court's reasoning is as follows:

> "A plaintiff's subjective believe, opinion and/or assumption are not enough as a matter of law to show causation. *Mitchell v. Toledo Hospital*, 964 F2d 577 (6th Cir, 1992)...It is enough to defeat a claim of unlawful retaliation if the activities affected others who did not file a complaint. See *Triplett v. Electronic Data Sys.*, 710 F Supp 667 (W.D. Mich. 1989)." (R.78, 10/15/04, Memo Opinion and Order, p. 16; JA p. 88).

In support of these two positions, the District Court goes on to state:

> "Plaintiffs have merely testified to their assumptions that the actions taken by Defendants occurred after the suit was filed...Additionally, the pager retrieval and the comp time freeze affected all officers, not just

Plaintiffs in this case..." (R.78, 10/15/04, Memo Opinion and Order, p. 16; JA p. 88).

The District Court, in reaching this decision, would also have to come to the conclusion that Lt. William Dunbar's and former Plaintiff, Lt. Mark Bonza's testimony given under oath during their depositions is not to be believed. Lt. Bonza testified that the list of persons to get pagers from, contained the names of Appellants only and those were the individuals from whom he collected pagers (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 27, Bonza Dep, pp. 25-30; JA pp. 862-864). Further, Lt. Dunbar testified that, as members of the SRU-SWAT Unit, the firefighters assigned to this Unit did not have their pagers taken from them (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 8, Dunbar Dep, pp. 24-25; JA p. 790).

1. APPELLEES ENGAGED IN RETALIATORY CONDUCT:

In *Scott v. Sunrise Healthcare Corp*, 195 F3d 938 (7th Cir, 1999), the court held that, in order to establish a prima facie case of retaliation in violation of the FLSA, the plaintiffs must show that: (1) they engaged in protected expression; (2) they suffered an adverse employment action; and (3) a causal

link existed between the protected expression and adverse employment action; *Scott* at 940; see also, *Harrison v. Metropolitan Gov't*, 80 F3d 1107, 1118 (6th Cir, 1996)(citing *Wrenn v. Gould*, 808 F2d 493, 500 (6th Cir, 1987)). See also *Hysten v. Burlington Northern & Santa Fe Railway*, 296 F3d 1177 (10th Cir, 2002).

A. APPELLANTS ARE ABLE TO SET FORTH A PRIMA FACIE CASE OF RETALIATION IN VIOLATION OF SECTION 215 OF THE FLSA.

(i) APPELLANTS WERE ENGAGED IN AN ACTIVITY PROTECTED BY THE FLSA:

Appellants collectively filed a Complaint in the United States District Court for the Eastern District of Michigan on March 25, 2002, alleging a violation of the applicable provisions of the FLSA (R.1, 3/25/02, Complaint; JA p. 20). The Complaint alleged that they were entitled to overtime compensation during the period of time that they were on-call and subject to discipline, relative to their employment with the Airport Police Department while being assigned to certain specialty units. Section 215(a)(3), in pertinent part, provides that an employer shall not, in any manner, discriminate

against any employee because such employee has filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this Act.

The record establishes that the Complaint was served on Wayne County, through the County Clerk, on April 5, 2002, and that, shortly thereafter, Appellee DeBeau met with Appellee Booth (the Chief of Police), and Appellee DeBeau's manager, Daniel Kerber, to discuss the lawsuit. At that point in time, the decision was made to take-away Appellants' pagers only and not from any other employees (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 28, DeBeau Dep, pp. 25-26; JA pp. 873-874).

Just three days after the Complaint was served, Sgt. Mark Bonza, a former Plaintiff herein, was ordered to pick-up the pagers on or about April 8, 2002 by Executive Lt. Stephen Koester, and was given a list of those individuals who were to have their pagers confiscated (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 27, Bonza Dep, pp. 25-42; JA pp. 862-867).

Therefore, it is clear that Appellants have fulfilled their requirements under the second part of proving a prima facie case of retaliation.

(ii) THEREAFTER, APPELLEES TOOK AN EMPLOYMENT ACTION ADVERSE TO APPELLANTS:

Within a matter of two to three days after serving Appellees with a copy of the lawsuit, Appellee DeBeau ordered Appllee Booth to confiscate the employees' pagers.

Further, Appellants filed their First Amended Complaint on April 30, 2002, which named as Defendants, Appellees DeBeau and Booth, for the first time (R.4, 4/30/02, 1st Amd Complaint; JA p. 26). Appellee DeBeau was served with a Waiver of Service of Summons and a copy of the First Amended Complaint, by way of registered mail, on May 2, 2002 (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 30, Signed Waiver for DeBeau; JA p. 884). Within ten days of Appellee DeBeau's receipt of the First Amended Complaint, naming him as a Defendant, he ordered Appellee Booth to eliminate the ability of the officers to earn compensatory time while involved in training exercises (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 31, 5/16/02 Memorandum; JA p. 889). Further, eleven days after receiving the Waiver of Service of Summons and the First Amended Complaint, Appellee DeBeau ordered Appellee Booth to eliminate the

flat-rate mileage payment, which amounted to several hundred dollars per month, for those officers assigned to the K-9 Unit who transported their police dogs between their home and the Airport Police Station on a daily basis (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 32, 5/17/02 K-9 Unit SOP; JA p. 891).

Appellant Tavtigian, a K-9 officer, testified that he attended a meeting conducted by Appellee Booth, where the new K-9 operating procedure was explained to the officers assigned to the K-9 Unit (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 32, 5/17/02 K-9 Unit SOP; JA p. 891). **Tavtigian testified that Appellee Booth told those officers assembled that, the reason the comp time was being taken-away was because of "pager-gate," the name given to the lawsuit filed on March 25, 2002.** Further, Appellee Booth stated that he personally felt that comp time was an excellent tool and he hoped to get the practice back (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 33, Tavtigian Dep, pp. 33-34; JA pp. 897-898). Appellant Tavtigian also testified that, at the meeting with Appellee Booth, the officers were advised that their flat-rate mileage was being taken-away and that they would be required to take a marked patrol car home with them for the purpose of transporting their dogs

(R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 33, Tavtigian Dep, pp. 33-35; JA pp. 897-898).

(iii) THERE WAS A CAUSAL CONNECTION BETWEEN THE PROTECTED ACTIVITY AND THE ADVERSE EMPLOYMENT ACTION.

This Honorable Sixth Circuit Court of Appeals, in *Nguyen, supra*, set forth the law as to what is required of a plaintiff in proving a prima facie case of retaliation. The *Nguyen* court, at 563, stated as follows:

> "To establish the causal connection required in the fourth prong, a plaintiff must produce sufficient evidence from which an inference could be drawn that the adverse action would not have been taken had the plaintiff not filed a discrimination action. See *EEOC v. Avery Dennison Corp*, 104 F3d 858, 861 (6th Cir., 1997); *Jackson v. RKO Bottlers*, 743 F2d 370, 377 (6th Cir, 1984). Although no one factor is dispositive in establishing a causal connection, evidence that defendant treated the plaintiff differently from similarly situated employees or that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation. See *Moon v. Transport Drivers, Inc.*, 836 F2d 226, 230 (6th Cir, 1987). The burden of establishing a prima

> facie case in a retaliation action is not onerous, but one easily met. See *Avery*, 104 F3d at 861."

Appellants are able to show that the adverse action was taken within days, not months, of the filing of their original Complaint on March 25, 2002, and serving it on Appellees on April 4, 2002; or when the Appellants filed their First Amended Complaint on April 30, 2002, and served it on Defendants on May 6, 2002 (R.1, 3/25/02, Complaint; JA p. 20), (R.4, 4/30/02, 1st Amd Complaint; JA p. 26).

Some courts have characterized the period of time in which the adverse employment action took place to be the temporal proximity between the protected activity and the adverse employment action;*Hysten, supra* at 1183-1184.

The law of this Honorable Sixth Circuit, as established by *Nguyen, supra*, makes it clear that "the burden of establishing a prima facie case in a retaliation action is not onerous, but one easily met." (*Nguyen* at 563)[Emphasis Added]

B. APPELLEES' STATED, LEGITIMATE, BUSINESS REASON.

Appellees answered Appellants' First Set of Interrogatories, wherein Appellee DeBeau was asked to state the legitimate business reason why he made a decision to take-away Appellants' pagers, and he stated it was for the purpose of accommodating Appellants. Appellants' First Set of Interrogatories to Appellee DeBeau first asked, "Please identify the individual(s) answering these Discovery Requests," to which Appellee DeBeau responded that he was doing so on behalf of himself (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 34, DeBeau's Answers to Interr; JA p. 899). Further, Appellants' second interrogatory to Appellee DeBeau asked him to state the legitimate business reason for taking-away Appellants' pagers, wherein he responded:

> **ANSWER:**
>
> When Defendants learned that the officers claimed that carrying the pagers was so restrictive that they could not use the time effectively for personal pursuits, the pagers were collected to stop that complaint. See also Detroit Metropolitan Wayne County Authority's Answers to Plaintiffs' First Set of Interrogatories (R.76, 8/18/03, Resp Defs'

Mtn Summ Judg, Ex. 34, DeBeau's Answers to Interr; JA p. 899).

However, during the course of his deposition, Appellee DeBeau changed his answer to this question as follows:

> "A. One of the other reasons is, as we looked at the situation, if, in fact, we were going to give them relief and they were making this complaint, that we also remove it so that if there was any liability, that we would no longer continue to cause harm to the officers.
>
> Q. What type of liability are your making reference to?
>
> A. Meaning that this – – because of this lawsuit" (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 28, DeBeau Dep, pp. 25-27; JA pp. 873-874).

The legitimate business reason for requiring the officers to use a County-owned car to convey their police dogs to and from the station, and in taking away the officers' bi-weekly flat-rate mileage, was a knee-jerk attempt by Appellee DeBeau to further punish the K-9 officers for

bringing this lawsuit. The policy was ill-conceived to begin with and was ultimately done away with.

Further, Appellees' legitimate business reason for taking-away Appellants' pagers was, allegedly, to accommodate Appellants' request as stated in their Complaint, to not burden them during their off-duty hours (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 34, DeBeau's Answers to Interr; JA p. 899).

Appellee DeBeau's reason for eliminating the comp time was because it was costing the County too much money in overtime to replace the officers when they utilized their comp time (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 28, DeBeau Dep, pp. 32-35, 42-59; JA pp. 875-881). However, it was pointed-out to Appellee DeBeau during his deposition that the officers primarily used their comp time in lieu of utilizing their banked vacation time. Under the Union contract, officers are paid-off for their excess vacation time once per year (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 1, Local 502 Contract, pp. 52-54; JA pp. 740-742).

Appellee DeBeau's Answer that the utilization of the comp time by the officers caused the Department to pay overtime to those employees who had to replace the officers who were off on comp time, is absolutely not true. General

Order No. 8340, entitled "Compensatory Time Off", specifically prohibits the use of comp time if it creates overtime. General Order No. 8340.20 provides as follows:

> "8340.20 **Requests to Use Compensatory Time:** Requests to utilize compensatory time shall be submitted to the employees' supervisor on the "compensatory time off request" form. Approval to use compensatory time shall be granted if the use does not unduly disturb the operation of the shift/unit.
>
> Use of compensatory time may be denied if it creates overtime. Every reasonable effort will be made to honor the employee's request" (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 35, General Order 8340; JA p. 905).

Therefore, Appellee DeBeau's stated, legitimate, business reason as to comp time is not to be believed.

In summation, Appellees have proffered three legitimate business reasons for their actions:

1. REMOVAL OF THE PAGERS WAS DONE TO ACCOMMODATE THE EMPLOYEES' REQUEST NOT TO ENCUMBER THEIR PERSONAL TIME (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 28, DeBeau Dep, pp. 24-28; JA pp. 873-874).

2. THE OFFICERS HAD THEIR FLAT-RATE MILEAGE TAKEN AWAY BECAUSE OF THE REQUEST THAT WAS MADE BY THE UNION YEARS AGO (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 28, DeBeau Dep, pp. 64-66; JA pp. 882-883).

3. COMP TIME WAS ELIMINATED BECAUSE IT CAUSED AN INCREASE IN OVERTIME (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 28, DeBeau Dep, pp. 34-36; JA p. 876).

C. **APPELLEES' STATED LEGITIMATE BUSINESS REASONS WERE PRETEXT FOR RETALIATION:**

Appellants can prove pretext for retaliation by introducing direct or circumstantial evidence of retaliation. Pretext can be shown by: (1) that the reason had no basis in fact; (2) that, if there was a factual basis for the employer's reason, the reasons were not the actual factors motivating the employment decision; or (3) that, if the reasons were factors, they were insufficient to justify the decision. (*Barnhart v. Pickrel Schaeffer Ebeling & Co*, 12 F3d 1382 (6th Cir, 1993)).

The United States Supreme Court, in *Reeves v. Sanderson Plumbing Products Inc,* 350 U.S. 133 (2000), set forth the standards which the District Court must use in

determining if the legitimate business reason for taking the retaliatory action was pretextual. One of the first cases of this Honorable Sixth Circuit Court to discuss *Reeves* is *Cicero v. Borg Warner Automotive Inc*, 280 F3d 579 (6th Cir, 2002). Under the heading "Pretext", the *Cicero* court, at pages 589-590, stated as follows:

> "3. Pretext:
>
> The district court stated that even if the plaintiffs established a prima facie case, the plaintiffs would be unable to defeat the defendants' proffered reason for termination. We find that the district court erred in reaching such a conclusion. We find that Cicero offering enough evidence to create a genuine issue of material fact that the defendants' reason for firing him was a pretext for discrimination...
>
> ...Under the first and third methods of showing pretext, the fact finder may infer discrimination from the circumstances. See *Kline v. Tenn Valley Auth*, 128 F3d 337, 346 (6th Cir, 1997) ("When a plaintiff proves that the defendant's proffered reasons either have no basis in fact or are insufficient to motivate discharge, a permissive inference of discrimination arises."); *Manzer*, 29 F3d at 1084. Under the second method, Cicero may not rely exclusively on his prima facie

evidence, but instead must introduce some further evidence of discrimination. n3 See *Reeves v. Sanderson Plumbing Prods, Inc*, 530 US 133, 143, 147 L Ed 2d 105, 120 S Ct 2097 (2000) (allowing the fact finder to consider the plaintiff's prima facie evidence when evaluating if the defendant's proffered reason was a pretext); *Kline*, 128 F3d at 346 (noting that "when the reasons offered by the defendant did not actually motivate the discharge, "the plaintiff must introduce "additional evidence of discrimination"); *Manzer*, 29 F3d at 1084 (noting that the plaintiff "may not simply rely on his prima facie evidence")

---

n3 This Court in *Manzer* limited the need for a plaintiff to show additional evidence of discrimination under the second method of proving pretext to those situations in which the plaintiff does not factually challenge the defendant's proffered reason for discharge. See *Kline v. Tenn Valley Auth*, 128 F3d 337, 346 (6th Cir, 1997) ("The rule announced in the *Manzer* opinion is limited to the case when the reasons offered by the defendant are not factually challenged."); *Manzer v. Diamond Shamrock Chems Co*, 29 F3d 1078, 1084 (6th Cir, 1997)."

When the evidence is viewed in a light most favorable to Appellants, the District Court's grant of summary

judgment, as to Appellants' claims of retaliation, was inappropriate based upon the disputed facts in this case.

WHEREFORE, Appellants respectfully request that this Honorable Court of Appeals reverse the order of the District Court in dismissing their cause of action of retaliation in violation of the FLSA.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT WAYNE COUNTY AND THE WAYNE COUNTY AIRPORT AUTHORITY ARE NOT PROPER DEFENDANTS PURSUANT TO APPELLANTS' COUNT III ALLEGING A VIOLATION OF 42 U.S.C. §1983:

A. Standard of Review:

Appellants hereby rely upon the "Standard of Review" set forth in their Argument I above.

B. Argument:

In dealing with Appellants' retaliation claim alleging a violation of their First Amendment rights, as actionable under 42 U.S.C. §1983, the District Court stated as follows:

> "First, the employee must show that his or her speech touched on matters of public concern.

See *Connick v. Myers*, 461 U.S. 138, 146, 103 S Ct 1684, 75 L Ed 708 (1983). Second, the employee's interest "in comomenting upon matters of public concern" must be found to outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S Ct 1731, 20 L Ed 2d 811 (1968); *Boger v. Wayne County*, 950 F2d 316, 322 (6th Cir, 1991)." (R.78, 10/15/04, Memo Opinion and Order, p. 18; JA p. 90).

The District Court concludes at page 20 by stating:

"...Reviewing the initial Complaint, the basis of the retaliation claims in Plaintiffs' subsequent amended Complaints, the Court finds that the FLSA claim does not rise to "matters of public concern" but related only to Plaintiffs' individual concerns regarding non-payment of overtime while on call. Nothing in their FLSA claim suggest that Plaintiffs were filing a lawsuit involving "matters of public concern."...("If a public employee is retaliated against for filing a lawsuit, the public employee has no First Amendment claim unless the lawsuit involves a matter of public concern."). Plaintiffs have failed to state a Free Speech Clause claim under the First Amendment for filing their lawsuit under FLSA...." (R.78, 10/15/04, Memo Opinion and Order, p. 20; JA p. 92).

As Appellants understand the District Court's reasoning, the Court stated that, as a matter of law, Appellants have not set forth a retaliation claim in violation of their First Amendment rights, as the issues contained in their Complaint do not touch upon "matters of public concern."

Appellants respectfully disagree with the opinion of the District Court that their Complaint did not rise to a level of "matters of public concern." There was one newspaper article and one editorial in the Detroit News demanding that Appellee Airport Authority return the pagers to the officers at the Airport in order to ensure the safety of the citizens of the State of Michigan utilizing the Airport, and the officers who work there. The two newspaper articles were annexed to Plaintiffs' Response to Defendants DeBeau's and Booth's Motion for Summary Judgment (R.60, 6/25/03, Resp DeBeau & Booth's Mtn Summ Judg, Ex. 18, 4/14/03 Article; JA p. 559), (R.60, 6/25/03, Resp DeBeau & Booth's Mtn Summ Judg, Ex. 19, 4/16/03 Editorial; JA p. 561).

Appellees' argument, relative to Count III, is that there is no liability under the doctrines of respondent superior or vicarious liability under 42 U.S.C. §1983. This is true, except in cases where the governmental units (in this case, Appellees Wayne County and the Airport Authority) have delegated

their final rule-making policy to an executive in charge of running a governmental agency. In the case at bar, pursuant to the provisions of the collective bargaining agreement between Local 502 and Wayne County, the parties have agreed that the Airport Director may cause reasonable rules of conduct and disciplinary procedure, which are not in conflict with Article 9 of the collective bargaining agreement (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 1 Local 502 Contract, p. 5; JA p. 728).

Likewise, the contract between Local 3317 and Defendants provides for the identical language in Article 16, Section 16.02 (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 3, Local 3317 Contract, p. 25; JA p. 747).

Appellees Wayne County and/or the Airport Authority are liable for Appellee DeBeau's actions. In *Monell v. Dept of Social Services*, 436 U.S. 658 (1978), the United States Supreme Court held that a municipality is qualified as a "person", liable to suits under §1983.

In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), the Supreme Court held that municipal liability, under §1983, attaches where a deliberate choice to follow a course of action is made from among various alternatives by officials responsible for establishing final policy with respect to the

subject matter in question. *Pembaur* at 483-484. In the case at bar, Appellee DeBeau exercised final, policy-making authority (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 25, Booth Dep, pp. 40-48; JA pp. 852-854), (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 28, DeBeau Dep, pp. 17-18, 62-63; JA p. 882).

The Supreme Court, in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), reinforced the principles in *Pembaur, supra*, that the question of whether an official has final, policy-making authority is a question of state, and not federal, law. The Court emphasized the requirement that the official have final, policy-making authority, stating that, "the authority to make municipal policy is necessarily the authority to make final policy." *Praprotnik* at 127.

Therefore, Appellee DeBeau, as the final, policy-making authority within the Airport, has made Appellees Wayne County and Airport Authority, liable for his acts.

It is further obvious that the multiple acts of retaliation, as alleged by Appellants, constitute a "policy" on the part of Appellees. Appellee DeBeau, being the final policy-maker, was exercising governmental policy when he determined to retaliate against Appellants.

Appellees also argue that Appellants are unable to show a policy or custom and therefore, cannot succeed in their §1983 claim. The policy alleged is that of retaliating against Appellants in violation of their First Amendment rights, under the United States Constitution, to be free from retaliation for seeking redress by filing a lawsuit. The Supreme Court qualified this holding in *Monell, supra*, by requiring that the claim be based upon the implementation or execution of "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell* at 690. The court further held that:

> "...like every other §1983 person, by the very terms of the statute, a municipality and therefore its officers vested with final rule-making authority may be sued for constitutional deprivation vested pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels." *Monell* at 690-691.

Therefore, the multiple acts of retaliation by Appellees constitute a custom or policy of the municipality and this is so even though there is no official approval of said custom and policy made through the decision-making channels.

Therefore, even if this Honorable Court were to determine that one of the acts of retaliation as alleged by Appellants constitutes an act of retaliation, Appellants' cause of action under 42 U.S.C. §1983, still prevails. Here again, but for Appellants filing their lawsuit, they would not have had their pagers taken away, and would not have had the loss of comp time and the loss of flat-rate mileage for those officers assigned to the K-9 Unit.

WHEREFORE, Appellants respectfully request that this Honorable Court reverse the grant of judgment as a matter of law and remand Appellants' cause of action to the District Court for trial.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANTS' CLAIMS AGAINST INDIVIDUAL DEFENDANT, MARK DeBEAU:

A. Standard of Review:

Appellants hereby rely upon the "Standard of Review" set forth in their Argument I above.

B. Argument:

In the face of direct testimony from Appellee DeBeau, that a reason he took the pagers way from Appellants was to eliminate the possibility of additional damages if the Plaintiffs prevailed in this FLSA-lawsuit, Appellees disingenuously argued to the District Court that there are no genuine issues of material fact which would allow Appellants' cause of action against Appellees to go to the jury (R.76, 8/18/03, Resp Defs' Mtn Summ Judg, Ex. 28, DeBeau Dep, pp. 26-27; JA p. 874).

Appellants' claims of retaliation are founded under the anti-retaliation provisions of the FLSA, that being 29 U.S.C. §215(a)(3), and Appellants claim retaliation in violation of their First Amendment rights to free speech; in this case, the filing of a lawsuit in federal court.

The testimony is so overwhelming, as to the retaliation instituted by Appellee DeBeau, that, when the evidence is viewed in a light most favorable to Appellants, summary judgment should not have been granted by the District Court.

1. APPELLEE DeBEAU ENGAGED IN RETALIATORY CONDUCT:

In *Scott v. Sunrise Healthcare Corp*, 195 F3d 938 (7th Cir, 1999), the court stated that, in order to establish a prima facie case of retaliation in violation of the FLSA, the plaintiffs must show that: (1) they engaged in protected expression; (2) they suffered an adverse employment action; and (3) a causal link existed between the protected expression and adverse employment action; *Scott* at 940.

See *Harrison v. Metropolitan Gov't*, 80 F3d 1107, 1118 (6th Cir, 1996)(citing *Wrenn v. Gould*, 808 F2d 493, 500 (6th Cir, 1987)). See also *Hysten v. Burlington Northern & Santa Fe Railway*, 296 F3d 1177 (10th Cir, 2002).

Appellants hereby adopt their arguments contained in Part II of this Brief as support that Appellees engaged in retaliatory conduct in violation of the FLSA.

2. APPELLEE DeBEAU IS NOT ENTITLED TO QUALIFIED IMMUNITY AS HE KNEW, OR SHOULD HAVE KNOWN, THAT RETALIATION FOR APPELLANTS' FILING A COMPLAINT IS A VIOLATION OF THEIR FIRST AMENDMENT SPEECH RIGHTS AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS:

Appellees argue that Appellee DeBeau is entitled to qualified immunity because, "...Plaintiffs cannot show that any Defendant retaliated against them, they cannot show they were deprived of any rights in order to sustain a claim under 42 U.S.C. §1983" (R.51, 5/30/03, DeBeau & Booth Mtn Summ Judg, p. 11; JA p. 196).

Appellees then go on to state that, "Even if they [Plaintiffs] can make such a showing,...DeBeau are [is] entitled to qualified immunity," relative to Appellants claims of retaliation in violation of Appellants' First Amendment rights of free speech, as actionable under 42 U.S.C. §1983 (R.51, 5/30/03, DeBeau & Booth Mtn Summ Judg, p. 11; JA p. 196).

The Supreme Court, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1987), issued a definitive statement on qualified immunity:

> "Governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would know." 457 U.S. 800, 818 (1982).

Thus, this Honorable Court must determine whether Appellee DeBeau reasonably should have known that his actions would be inconsistent with Appellants' First Amendment rights. *Guerico v. Brady*, 911 F2d 1179, 1183 (6th Cir, 1990).

This issue requires the Court to weigh the parties' arguments as to whether or not Appellee DeBeau violated a clearly-established, statutory or constitutional right; *Tucker v. Callahan*, 867 F2d 909, 913-14 n.3 (6th Cir, 1989). In determining whether a particular right was clearly- established at the time an official acted, the court typically considers: (1) whether the right in question was defined with reasonable specificity; (2) whether the decision or law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under pre-existing law a reasonable defendant official would have understood that his or her acts were unlawful; *Bradway v. Gonzales*, 23 F3d

313, 318 (2nd Cir, 1994), citing *Germosen v. Smith* 945 F2d 547, 550 (2nd Cir, 1991) and *Ward v. Dyke*, 58 F3d 276 (6th Cir, 1996).

This Honorable Sixth Circuit, in *Dickerson v. McClellan*, 101 F3d 1151, 1157 (6th Cir, 1996) stated, "The issue whether qualified immunity is applicable to an official's action is a question of law." Further, this Court in *Chappel v. Montgomery County Fire Protection District No. 1, et al*, 131 F3d 564 (6th Cir, 1997), stated that:

> "Where the plaintiff alleges a constitutional violation, we look first to determine whether based on the applicable law, a constitutional violation occurred. If we find a violation, we then consider whether it involved clearly established constitutional rights of which a reasonable person would have known. *Blair v. Mead*, 76 F3d 97, 100 (6th Cir, 1996)."

Clearly the individual Appellant herein, Mark DeBeau, is not entitled to qualified immunity, as otherwise recognized under the common law interpreting 42 U.S.C. §1983.

It has been held that the right to participate as a party to litigation, seeking to remedy an infringement of constitutional guarantees or other legal rights, is an aspect of

the right to petition for redress of grievances, and a public employee cannot be retaliated against for participating in a legal proceeding either as a party or as a witness. *Filippo v. Bongiovanni*, 30 F3d 424 (3rd Cir, 1994).

Appellee DeBeau knew, or should have known, that the FLSA forbade him from retaliating against Appellants for exercising their First Amendment right to petition the District Court for overtime pay they claim they are entitled to under the FLSA. Clearly, the standards set forth in *Tucker, supra*, imposed upon Appellee DeBeau the obligation not to discriminate against Appellants for exercising their rights under the First Amendment, and the FLSA. To put the argument in a different light, but for Appellants filing the lawsuit, they would not have had their pagers taken away from them, would not have had their ability to earn comp time taken away from them, and would not have had their flat-rate mileage taken away from them.

In his Brief in Support of his Motion for Summary Judgment, Appellee DeBeau set forth his reasons why he took action relating to removing the pagers, eliminating comp time and ordering the officers to use a County-owned vehicle to transport their police dogs to and from their residences (R.51, 5/30/03, DeBeau & Booth Mtn Summ Judg, p. 12; JA p. 197).

Appellants have responded to each of these arguments above and incorporate said arguments to avoid repetition.

Appellants have set forth a cause of action of retaliation, when they exercised their rights under the First Amendment by filing their original Complaint, and the amendments thereto (R.1, 3/25/02, Complaint; JA p. 20), (R.4, 4/30/02, 1st Amd Complaint; JA p. 26), (R.8, 6/12/02, 2nd Amd Complaint; JA p. 37), (R. 55, 6/5/03, 3rd Amd Complaint; JA p. 53). The District Court committed reversible error in finding that Appellants stated a personal cause of action in their Complaint, rather than an action which touched upon public concern (R.78, 10/15/04, Memo Opinion and Order, p. 18; JA p. 90). This may have been the case in Appellants' original Complaint, but in their First, Second and Third Amended Complaints, they alleged matters which touch on public concern, namely, the retaliation by Appellees removing, or otherwise taking away, Appellants' pagers and other benefits. The Detroit News editorialized that such conduct was a matter of public concern that needed to be addressed immediately by Appellee Airport Authority (R.60, 6/25/03, Resp DeBeau & Booth's Mtn Summ Judg, Ex. 19, 4/16/03 Editorial; JA p. 561).

Just as in the issues dealing with the FLSA, questions of fact remain for the jury to decide, and the District Court engaged in impermissible fact-finding.

Appellants' Complaints, which are actionable under 42 U.S.C. §1983, alleging a violation of their First Amendment rights, was properly before the District Court and should not have been dismissed.

WHEREFORE, Appellants respectfully request that this Honorable Court reverse the decision of the District Court and remand Appellants' cause of action for trial.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Appellants respectfully request that this Honorable Court reverse the decision of the District Court to grant judgment as a matter of law and remand Appellants' causes of action to the District Court for trial.

Respectfully submitted,

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Dated: August 17, 2005

CERTIFICATE OF COMPLIANCE
WITH F.R.A.P. 32(a)(7)

The undersigned attorney certifies that this Final Brief consists of 13,349 words as counted by the computer word processing software used to produce this brief, WordPerfect 12.

Respectfully submitted,

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Dated: August 17, 2005

In the
UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Case No. 04-2457

MICHAEL ADAIR, WILLIAM CHILDRESS, LEON DENTON, CHARLES ELSTONE, RICHARD FREDERICK, RICHARD HITCH, ERNEST HUNTER, CHARLES JOHNSON, VICTOR KLINE, JOHN MALANIAK, MICHAEL MOLITOR, PAUL MOLITOR, PETER MOLITOR, DAVID OKONEY, DEAN PIGOTT, BRUCE PRESTON, MICHAEL TAVTIGIAN, JOHN TESCHKE, ROBERT TIPTON and BRADFORD VINCENT,
Plaintiffs-Appellants,

v.

CHARTER COUNTY OF WAYNE, DETROIT METROPOLITAN WAYNE COUNTY AIRPORT AUTHORITY, MARK DeBEAU and KENT BOOTH,
Defendants-Appellees.

APPELLANTS' DESIGNATION OF APPENDIX CONTENTS

Appellants, pursuant to Sixth Circuit Rule 30(b), hereby designate the following filings in the District Court's record as items to be included in the Joint Appendix:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.
Complaint	03/25/02	1
1st Amd Complaint	04/30/02	4
2nd Amd Complaint	06/12/02	8
DeBeau & Booth Mtn Summ Judg	05/30/03	51
Defs' Mtn Summ Judg	06/02/03	53
3rd Amd Complaint	06/05/03	55
Resp DeBeau & Booth's Mtn Summ Judg	06/25/03	60
Ex. 18, 4/14/03 Article Ex. 19, 4/16/03 Editorial		
Resp Defs' Mtn Summ Judg	08/18/03	76
Ex. 1, Local 502 Contract Ex. 3, Local 3317 Contract Ex. 4, General Order re: SRU-SWAT		

Ex. 5, General Order re: EOD
Ex. 6, General Order re: K-9
Ex. 7, General Order re: AI
Ex. 8, Dunbar Dep
Ex. 9A, 3/30/94 Order
Ex. 9B, 7/29/96 Order
Ex. 10, Michalski Dep
Ex. 11, Lt. Denton Affidavit
Ex. 12, Adair Dep
Ex. 13, Childress Dep
Ex. 14, Elstone Dep
Ex. 15, Johnson Dep
Ex. 16, Hunter Dep
Ex. 17, Brett Michalski Dep
Ex. 18, Paul Molitor Dep
Ex. 19, Wasiukanis Dep
Ex. 20, Pigott Dep
Ex. 21, Elstone's Answers to Interr
Ex. 22, Peter Molitor Dep
Ex. 23, Tipton Dep
Ex. 24, 5/17/02 Order
Ex. 25, Booth Dep
Ex. 26, Frederick Dep
Ex. 27, Bonza Dep
Ex. 28, DeBeau Dep
Ex. 30, Signed Waiver for DeBeau
Ex. 31, 5/16/02 Memorandum
Ex. 32, 5/17/02 K-9 Unit SOP
Ex. 33, Tavtigian Dep
Ex. 34, DeBeau's Answers to Interr
Ex. 35, General Order 8340

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FILING AND MAILING CERTIFICATE

In compliance with Fed. R. App. P. 25(c), I hereby certify that on this 17th day of August, 2005, I filed with the Clerk's Office of the United States Court of Appeals for the Sixth Circuit the required number of copies of this FINAL BRIEF OF THE APPELLANTS and further certify that I mailed via U.S. Mail this same date from Cincinnati, Ohio two copies to opposing counsel.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
Oct. 15, 2004
Eastern District
of Michigan,
Clerk

MICHAEL ADAIR, ET AL.,

Plaintiffs,

v. Case No. 02-CV-71139-DT
Honorable Denise Page Hood

COUNTY OF WAYNE, ET AL.,

Defendants.

_____/

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

On March 25, 2002, Plaintiffs filed the instant suit alleging a one-count Complaint against various Defendants seeking overtime pay under the Fair Labor Standards Act ("FLSA"), 29 US.C. § 211 *et seq*. Plaintiffs are certain officers at the Wayne County Airport Police Department and claim they were owed overtime for time worked over 40 hours per week while "on call" since March 1999. After Plaintiffs filed their initial Complaint, Plaintiffs claimed that the Airport officials collected the pagers from all

police officers, not just Plaintiffs. Plaintiffs thereafter amended their Complaint on April 30, 2002 to add a second count under 42 U.S.C. § 1993, alleging that the collection of all pagers was unlawful retaliation against the Plaintiffs. The initial Complaint involved twenty-five (25) Plaintiffs. Five additional officers joined in the First Amended Complaint.

On June 12, 2002, a Second Amended Complaint was filed adding a retaliation claim under FLSA. On May 21, 2003, Magistrate Judge Thomas A. Carlson granted Plaintiffs' Motion to Amend Complaint. Plaintiffs filed a Third Amended Complaint on June 5, 2003 alleging: violation of FLSA regarding overtime wages (Count I); retaliation in violation of FLSA, 29 U.S.C. § 215(a)(3) (Count II); retaliation in violation of 42 U.S.C. § 1983 (Count III); retaliation in violation of FLSA, 29 U.S.C. § 215(a)(3) (Count IV); retaliation in violation of FLSA, 29 U.S.C. § 215(a)(3) (Count V); retaliation in violation of FLSA, 29 U.S.C. § 215(a)(3) (Count VI) and retaliation under 42 U.S.C. § 1983 (Count VII). There are thirty (30) Plaintiffs in the current Third Amended Complaint: Michael Adair, Mark Bonza, William Childress, Leon Denton, Charles Elstone, Richard Frederick, Richard Hitch,

Ernest Hunter, Charles Johnson, Thomas Kendall, Victor Kline, John Lazarowicz, John Malaniak, James McKernan, Brian Meade, Brett Michalski, Michael Molitor, Paul Molitor, Peter Molitor, David Okoney, Dean Pigott, Bruce Preston, Carl Rubin, Mark Scarbrough, Michael Tavtigian, John Teschke,[1] Robert Tipton, Bradford Vincent, Michael Wasiukanis, and Joseph Weber. Defendants are: Charter County of Wayne, Detroit Metropolitan Wayne County Airport Authority, Mark DeBeau and Kent Booth.

The Court notes that although Defendant Detroit Metropolitan Wayne County Airport Authority has been dismissed pursuant to the Stipulated Order signed by the parties and entered by the Court on June 26, 2002, Plaintiffs continue to name that Defendant in their Third Amended Compliant. (Third Party Complaint, ¶ 4) Because the June 26, 2002 Stipulated Order was entered without prejudice after the Second Amended Compliant was filed but before the Third Amended Compliant was filed, the Court assumes Plaintiffs sought to add Defendant Metropolitan Wayne County Airport Authority into the suit

[1] The Court discloses that John Teschke was a deputy sheriff assigned to her courtroom in the Recorder's Court, State of Michigan at sometime between 1989 and 1992.

since that Defendant is named in the Third Amended Complaint.

The three dispositive motions (except the Motion to Dismiss for failure to comply with court order) currently before the Court were filed *before* Plaintiffs filed their Third Amended Complaint. At the hearing on the dispositive motions, the parties agree that the motions did not impact the remaining claims in the Third Amended Complaint, which added Counts VI (retaliation under FLSA) and VII (retaliation under 42 U.S.C. § 1983). The dispositive motions address Counts I to V of the Second Amended Complaint, which are the same Counts I to V in the Third Amended Complaint. The Court reviews the dispositive motions as addressing Counts I to V of the Third Amended Complaint since the Third Amended Complaint now governs the case.

The Court notes that after the hearing was held in this matter, both parties filed responsive and supplemental briefs.

II. FACTS

There are approximately 150 members of the Airport Police Department. The officers are members of

one of two local unions: Local 502 (officers) or Local 3317 (sergeants and lieutenants). Pursuant to collective bargaining agreements between the officers and Wayne County, the Airport Police Department officers have transfer rights to and from the Wayne County Sheriff's Department. A member of the Airport Police Department can be employed by the Airport Authority on one day and the very next day be transferred to the Wayne County Sheriff's Department and be an employee of the Wayne County. All employees of the Airport Police Department were originally employees of the Wayne County Sheriff's Department until the Airport Authority was fanned as a separate entity to operate the airport on March 26, 2002. (Ex. 1 and 3, Pl.'s Resp. Br.)

Plaintiffs' hours were determined by their respective collective bargaining agreements. Generally, they were scheduled to work a forty-hour workweek. If Plaintiffs wanted to work overtime, they would place their name on an overtime list and would be called to work according to seniority and/or their collective bargaining agreement, if and when overtime hours became available. An officer could refuse the overtime offered. (Adair Dep.,

p. 47) Officers working overtime were paid overtime pay. (McKernan Dep., p. 8)

Plaintiffs in this action are members of four specialty units: the Special Response Unit ("SRU-SWAT"); Explosive and Ordinance Disposal Unit ("EOD-Bomb Squad"); K-9 Unit; and, Accident Investigation Unit ("AI Unit"). The SRU, EOD, K-9 and AI officers are regulated by a general order. (Exs. 4, 5, 6, and 7, Pl.'s Resp. Br.) Plaintiffs claim all officers of the four specialty units were required to have their pagers on twenty-four hours a day, seven days a week and were subject to being on-call Plaintiffs further claim that they were restricted to live within thirty-minutes travel time from the Airport. Prior to September 11, 2001, Plaintiffs claim they generally could attend to their personal business while off-duty, subject to responding when paged. After September 11, 2001, all Plaintiffs were placed on twelve-hour shifts, working seven days per week and had their leave days and vacation days canceled. On September 21, 2001, officers were placed on ten-hour shifts, working six days per week and their vacations canceled. After September 11, 2001, the officers were ordered to stay close to home when they were off-duty.

In October 2001, Mark DeBeau was hired as the Director of Public Safety. He reviewed various policies and the Airport began to implement many changes for its police office. On May 17, 2002, a Sport Utility Vehicle was issued to each officer in lieu of paying every officer a flat-rate mileage for driving to and from work. The SUVs were outfitted with cages for the K-9 unit. As soon as the officers expressed their displeasure about losing a flat-rate mileage fee, the Department reinstated the K-9 officers' mileage.

On May 17, 2002, the Department decided to freeze the accumulation and use of banked "comp" time due to staffing problems caused by the heightened alerts from the September 11 terrorist attacks and the Government mandated personnel requirements. The Department was short of personnel and allowing officers to accrue "comp" time, in addition to their annual vacation time, would force the Department to fill the officer's position while off on "comp" time and then again for vacation time with officers paid overtime pay. The Department instead paid the officers overtime pay instead of "comp" time. In October 2002, the Union and the Wayne County Airport Authority agreed to pay the officers for the first 100 hours of accumulated "comp" time by November 1, 2002 with any

remaining balances to be paid by November 1, 2003. At the discretion of the Airport Authority, officers could use remaining comp time between November 1, 2002 and November 1, 2003, as long as it did not create additional overtime. (Ex. E, Comp Time Agreement)

After Plaintiff's filed their initial Complaint claiming that they could not effectively use their personal time because of the pagers, the Department collected the pagers from all officers, not just Plaintiffs. Plaintiffs claim the pagers were collected from the officers who were parties to the instant suit in retaliation for filing the instant suit.

III. ANALYSIS

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be entered only where "the pleadings, depositions, answers to the interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The presence of factual disputes will preclude granting of summary judgment only

if the disputes are genuine and concern material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Although the Court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex Corp.*, 477 U.S. at 322-23. A court must look to the substantive law to identify which facts are material. *Anderson*, 477 U.S. at 248.

B. Defendants Wayne County, Mark DeBeau, Kent Booth and the Wayne County Airport Authority's Motion for Summary Judgment

1. Count I: Violation of FLSA, 29 U.S.C. § 201 *et seq.*

In their Third Amended Complaint, Plaintiffs claim they have been required to work for the Defendant County in excess of forty hours per week commencing March 1999 without compensation, in violation of 29 U.S.C. § 201 *et seq.* Defendants claim that Plaintiffs' so called "on-call" time is not compensable under FLSA as a matter of law.

FLSA states that overtime compensation may not be deferred and that such wages must paid on the regular related payday. 29 C.F.R. 778.106 (1992). The rate is one and a halftimes the regular hourly rate. 28 U.S.C. § 207(a)(1) (1988). FLSA is applicable to municipalities and other public employees. *Garcia v. San Antonio Metro Trans. Auth.*, 469 U.S. 528 (1985). The employer is required to keep identifying records about the employee and data about the hours worked and wages earned. 29 U.S.C. § 216(c). Once an employee has carried his burden that he or she performed the work, then the burden shifts to the employer to show that the employee is not entitled

overtime pay. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946); *Reich v. Palo Group Foster Home Inc.*, 183 F.3d 468, 473 (1999).

The United States Supreme Court has held that although FLSA does not state whether time spent on call is working time, under some circumstances, waiting time is compensable. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944). "An employee must be compensated for on call time spent 'predominantly for the employer's benefit.'" *Rutlin v. Prime Succession, Inc.*, 220 F.3d 737, 743 (6th Cir. 2000) (*quoting, Aiken v. City of Memphis*, 190 F.3d 753, 760 (6th Cir. 1999)). The Sixth Circuit has held that "on-call time spent at home may be compensable if the restrictions imposed are so onerous as to prevent employees from effectively using the time for personal pursuits." *Martin v. Ohio Turnpike Comm'n*, 968 F.2d 606, 611 (1992). A requirement that employees leave word where they can be reached will not be sufficient to make the on-call time compensable. *Id.* at 611. "Instead, the employees must show that the on-call policy imposes additional burdens that seriously interfere with their ability to use the time for personal pursuits." *Id.* Even if plaintiffs can show that the

policy has changed the plaintiffs' use of their free time, the fact that "some" of the plaintiffs' activities have been affected is not sufficient to make the on-call time compensable. *Id.* The plaintiffs must establish that the policy is "so onerous as to prevent them from effectively using their free time for personal pursuits" and must show "severe restrictions" on their personal time in order to survive summary judgment. *Id.* Admissions that plaintiffs participate in numerous activities preclude a finding that the plaintiffs were unable to use their time for their own pursuits. *Id.* at 612.

Plaintiffs first claim that they were subject to discipline for not responding to the pagers when called, citing *Martin*, *supra*. Plaintiffs argue that in *Martin*, the Sixth Circuited noted an unpublished district court case where the court concluded that the employees' obligation to respond to the pages prevented them from using the time for their own purposes because the employees were subject to discipline. *Martin*, 968 F.2d at 610-11. However, as the Sixth Circuit noted, the decision did not cite any cases and contained no legal-analysis to support its decision. *Id.* at 611. The Sixth Circuit noted that the defendant's policy included discipline for failure to respond to a page. *Id.* at

608. Although the defendant took disciplinary action 69 times in a three-year period for failure to respond to a page, the Sixth Circuit did not find that this policy was especially restrictive or burdensome and granted summary judgment in favor of the defendant. *Id.* at 612.

In this case, only three of the Plaintiffs claim to have been disciplined. Two of these incidents occurred while they were "on duty" and being paid. The third admitted he was verbally counseled and testified in his Answers to interrogatories that he was not disciplined but at his deposition, claimed he was disciplined. Most of the Plaintiffs testified that they were never disciplined for not returning a page. (*See*, Def.'s Motion, p. 8) The disciplinary actions in this case, if any, do not come close to the 69 times noted in the *Martin* case. The Sixth Circuit rejected the disciplinary argument in *Martin*. *Martin*, 968 F.2d at 612.

Plaintiffs next claim that they were restricted as to where they could live ortravel, citing *Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912, 916-17 (8th Cir. 1991) and *Owens v. Local No. 169*, 971 F.2d at 347 (9th Cir. 1992). The *Cross* case is distinguishable. The Eighth Circuit specifically noted that the case was unlike other

typical on-call cases in two respects. First, the defendant required the employees to monitor radio transmissions continuously during each work period, rather than contacting them exclusively by telephone or pager. *Cross*, 938 F.2d at 917. Because the radio was required to be on at all times, the employees' ability to entertain in their homes, attend social gatherings or engage in other personal pursuits, such as watching television or reading, was limited. *Id.* The Eighth Circuit also noted that instead of being placed on call for a defined number of hours during a work period, the policy placed the employees on an on call status twenty-four hours per day every day of a work week, unless a supervisor agreed to substitute for a particular employee for a period of time. *Id.* The *Owens* case does not support Plaintiffs' arguments because the Ninth Circuit found in favor of the employer. In the *Owens* case, the Ninth Circuit found that the plaintiffs, while on call, attended numerous events out-of-town and engaged in a broad variety of pursuits which demonstrated that each plaintiff had the option to engage in personal activities of their choice while on. call. *Owens*, 971 F.3d at 353.

In this case, the EOD-Bomb Disposal Unit and the K-9 Unit officers had to agree to live within 30 minutes

from the Airport to respond to calls. (Exs. 5 and 6, Pl.'s Resp. Br.) The SRU-SWAT Unit officers were required to have their police radios with them at an times and the police radios had coverage within Wayne County only. (Ex. 4, Pl.'s Resp. Br.) However, it is noted that the SRU Order indicates that SRU team members should maintain a "reasonable availability" when off-duty. (*Id.*) Although the SRU officers are issued a duty bag which includes a radio, there is no requirement in the Order that the radio must be monitored constantly. The Order further states that when called, SRU team members their "ETA" and that the response should be as quickly and safely as practical. It is only when the SRU is activated that Central Communications will advise "all concerned" of the designated radio channel for the SRU operation. (*Id.*)

Plaintiffs testified that they were never scheduled to be on call. They were permitted to go on vacation and/or turn down a call. Plaintiffs testified that if the first EOD officer of First K-9 officer called did not respond, the Department called the next officer on the list. Every year, the SRU unit traveled as a group, 300 miles from Wayne County, to go canoeing for an entire weekend. (Weber Dep., pp. 21-22) In their depositions, Plaintiffs admitted

they were not limited to any geographical area when they were off duty and admitted they could engage in all of their regular personal activities while off duty, including cooking, eating, sleeping, housework, movies, sports, visiting friends, family and neighbors, watching tv and working On computer, woodworking, going to the store, getting the oil changed, biking, playing with the kids, going to garage sales, hunting, fishing, motorcycling, bike rides, laundry, after school activities with kids, playing tennis, etc. (*See*, Def.'s. Br., pp. 4, 6-7, summary of deposition statements) As noted by the Sixth Circuit, admissions that plaintiffs participated in numerous activities preclude a finding that the plaintiffs were unable to use their time for their own pursuits. *Martin*, 968 F.2d at 612.

Plaintiffs testified they did not receive many calls over the past three years. In three years, SRU was called once, EOD twice, AI twice, and K-9 fifteen to twenty times. The Sixth Circuit in *Martin* noted that if an employee was called 3-6 times per day, each time requiring the employee to go into work, the time is compensable. If a plaintiff cannot show they are called back so frequently as to make effective use of their time impractical, the issue is not required to go to the jury, *Martin*, 968 F.2d at 611.

Although some of the Plaintiffs have to be able to be within a certain geographical area near the airport in order to be able to arrive at the airport within 30 minutes, that is the nature of an emergency service position—to be able to respond quickly as possible. This may restrict "where" Plaintiffs can live but does not restrict what Plaintiffs can do while off duty. The test under FLSA is not whether Plaintiffs are restricted as to where they can live but whether their time, off duty or while on call, is predominantly for the employer. *Rutlin*, 220 F.3d at 743. Plaintiffs have not shown that while off duty, they have been unable to engage in their personal activities and that such time off has been predominantly for the employer.

Plaintiffs finally claim that because they were on restrictions for approximately eleven weeks after September 11, 2001, they should be compensated for the time they were not at work. From September 11, 2001 to September 20, 2001, Plaintiffs worked twelve hour shifts, seven days per week. Plaintiffs worked ten hour shifts, six days per week from September 21, 2001 until November 26, 2001. After November 26, 2001, Plaintiffs were required to work nine hour days, five days per week. Plaintiffs claim during the hours they were not at work

during this time period, they were required to stay close to home because they were told to be available upon a moment's notice. Plaintiffs cite the testimonies of Plaintiffs Adair, Childress, Elstone and Michalski to show that Plaintiffs were restricted while not at work during this time period.

Plaintiff Adair testified that during this time period, "[w]e were expected to stay close" and that "we had to he available." (Adair Dep., pp. 68-69) Plaintiff Childress testified that he was not quite sure who told him he was restricted to his home or within five miles of his home but that it was general knowledge within the unit that "they would stay available to respond ill case you were needed." (Childress Dep., p. 55) Plaintiff Elstone testified that "we were told to remain close to home to be able to respond to the airport if we were needed further." (Elstone Dep., p. 40) He further testified that because he was working 12 hours he was not going very far because he went home to sleep, eat, visit with family that were at home and to do regular chores around the house and that he chose to stay at home to be with his family primarily. (Elstone Dep., pp. 40-41).

Although Plaintiffs were restricted from traveling during the few months after September 11, there were no

restrictions on any personal activities while at home or near home. Plaintiffs have not cited any testimony that during this period Plaintiffs were actually paged or called in to work. Plaintiffs have not shown that they had "severe restrictions" on their personal time in order to survive summary judgment. *Martin*, 968 F.2d at 611.

For the reasons set forth above, Plaintiffs FLSA claim must be dismissed.

2. Counts IT, IV, V and VI: Retaliation under FLSA, 29 U.S.C. § 215(a)(3)

a. *Prima Facie* Case

Plaintiffs claim that they were retaliated against for filing the instant lawsuit, in violation of the anti-retaliation provision under FLSA, 29 U.S.C. § 215(a)(3). Count 11 of Plaintiffs' Third Amended Complaint alleges that on or about April 24, 2002, after Plaintiffs served Defendant County with a copy of the suit, defendants retaliated against them by ordering Plaintiffs to relinquish their pagers and other related equipment necessary for the performance of Plaintiffs' duties and responsibilities. (Third Am. Comp., p. 8) In Count IV, Plaintiffs allege that they were retaliated against when Defendants DeBeau and Booth issued a

general provision order taking away mileage payments from Plaintiffs assigned to the K-9 Unit and requiring Plaintiffs to transport their dogs to and from their home in a County-owned vehicle i stead of Plaintiffs' personal vehicles. (Third Am. Comp., p. 11) Count V alleges that Plaintiffs were retaliated against when Defendants DeBeau and Booth notified all members of the Airport Police Department that they could no longer utilize their banked comp-time and that they could no longer earn comp-time for training purposes. (Third Am. Comp., p. 13) Plaintiffs allege in Count VI that Plaintiffs Molitor and Hitch were retaliated against. Plaintiff Molitor claims he was rotated from the international terminal to other areas or the airport in February 2003 and that he was denied the use of compensatory time in December 2002. Plaintiff Hitch claims that his request to attend school in September 2002 was denied. (Third Am. Comp., pp. 14-15)

The anti-retaliation provision of FLSA provides that an employer is prohibited from discharging or in any other manner discriminating against an employee because the employee has filed a complaint or proceeding under FLSA. 29 U.S.C. § 215(a)(3). The burden shifting analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

applies to a FLSA retaliation claim. *Porter v. Roosa*, 259 F.Supp.2d 638, 655 (S.D. Ohio 2003); *see, e.g., Williams v. General Motors Corp.*, 187 F.3d 553, 568 (6th Cir. 1999). A plaintiff must first make a *prima facie* showing of retaliation which, if shown, "in effect creates a presumption that the employer unlawfully discriminated against the employee." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). In order to make a *prima facie* claim of retaliation, a plaintiff must show that: 1) he or she engaged in an activity protected by FLSA; 2) his or her exercise of this right was known by the employer; 3) thereafter, the employer took an employment action adverse to her; and 4) there was a causal connection between the protected activity and the adverse employment action. *Williams*, 187 F.3d at 568.

b. Protected Activity and Knowledge of Employer

Plaintiffs have met the first two factors in that they filed the instant cause of action under FLSA, the protected activity, which was served upon Defendants.

c. Adverse Employment Action

An adverse action must be "materially adverse." *Kocsis v. Multi-Care Management, Inc.*, 97 F.2d 876, 887 (6th Cir. 1996). In order to constitute a materially adverse employment claim, the employer's decision must include: "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Kocsis*, 97 F.3d at 886-87. Mere inconvenience or an alteration of job responsibilities does not constitute a materially adverse action. *Id.* at 886. Retaliatory harassment may be actionable as long as the adverse employment action suffered is material. *Id.* at 887.

The claim in Count II must be dismissed. Plaintiffs' claim that they were retaliated against because their pagers were ordered returned does not constitute a materially adverse employment action. No loss in pay, benefits or duties resulted from the pagers collected from Plaintiffs. Plaintiffs have not shown any evidence that collecting the pagers from all officers, not just Plaintiffs, resulted in a loss in pay, benefits or duties.

The mileage issue claim in Count IV must also be dismissed. The issue in this case is not whether Plaintiffs did not receive reimbursement for mileage used in their personal vehicles while transporting their dogs in the vehicles but the change in policy from using personal vehicles to providing Plaintiffs with a county-issued vehicle. Mileage, not used, cannot be considered pay for work performed by Plaintiffs since Plaintiffs did not use any mileage which required reimbursement. Instead, Plaintiffs used county-issued vehicles outfitted with cages and other necessary K-9 equipment for Plaintiffs' dogs. Plaintiffs admitted they were not harmed by using the SUVs provided by the county instead of their personal vehicles. (Johnson Dep., p. 23) The purchase of SUVs was a subject of negotiations for many years prior to May 2002. (DeBeau Dep., p. 65) Two weeks after Plaintiffs received their SUVs, the mileage reimbursement was reinstated and the SUVs returned to the County. (*Id.* at 67) A temporary decision to use the SUVs instead of mileage reimbursement does not constitute an adverse employment action. *See, Von Gunten v. Maryland*, 243 F.3d 858, 867 (4th Cir. 2001) (Temporary withdrawal of use of a state vehicle does not constitute all adverse action.) (*citing Hishon v. King &*

Spalding, 467 U.S. 69, 75 (1984); *see, also, Allen v. Ohio Dep't of Rehabilitation and Correction*, 128 F.Supp.2d 483, 492 (S.D. Ohio 2001) (A fifteen-day suspension probably does not qualify as an adverse employment action).

Count V alleges that Plaintiffs were retaliated against when the administration decided to freeze the accumulation and use of banked comp time. Plaintiffs have not shown that the freeze on the use of comp time was a material loss of benefits. The freeze on the use of comp time does not constitute an adverse employment action because Plaintiffs were paid overtime pay in lieu of earning comp time. (Def.'s Br., Ex. D) Plaintiffs were compensated for their banked camp time. In Count VI, Plaintiffs Molitor and Hitch claim they were retaliated against when Plaintiff Molitor was rotated from the international terminal to other areas of the airport in February 2003 and when he was denied the use of compensatory time in December 2002; and when Plaintiff Hitch's request to attend school in September 2002 was denied. The comp time issue has been discussed above. As to the rotation from the international terminal this rotation does not constitute a material adverse employment action since Plaintiff Molitor has not

established that the rotation resulted in loss of pay, benefits or significant duties. Plaintiff Molitor was simply rotated for duty in other areas of the Airport. The denial of Plaintiff Hitch's request to attend school is also not a materially adverse employment action since Plaintiff Hitch has not shown that the denial resulted in loss of pay, benefits or significant duties.

d. Causal Connection

A plaintiff's subjective belief, opinion and/or assumptions are not enough as a matter of law to show causation. *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992). Evidence more than the fact that the alleged conduct came after the protected activity is requjred to establish causation. *Walbom v. Erie County Facility*, 150 F.3d 584, 589 (6th Cir. 1998). It is enough to defeat a claim of unlawful retaliation if the activities affected others who did not file a complaint. *See Triplett v. Electronic Data Sys.*, 71 0 F .Supp. 667 (W.D. Mich. 1989).

As to the claims regarding the pagers (Count II) and comp time (Count V), Plaintiffs have not provided any evidence showing that there was a causal connection between filing the suit and the actions taken by Defendants.

Plaintiffs have merely testified to their assumptions that the actions taken by Defendants occurred after the suit was filed. (*See* Bonza Dep., pp. 26, 35-36; Frederick Dep., p. 46; Johnson Dep., pp. 21-22; Kendal Dep., pp. 26-27; Lazarowicz Dep., p. 18; Michalski Dep., pp. 23-25; Okoney Dep., pp. 12-13; Preston Dep., p. 29; Teschke Dep., p. 10; Vincent, p. 18, Vincent Dep., pp. 15, 18). Additionally, the pager retrieval and the comp time freeze affected all officers, not just Plaintiffs in this case. (Bonza Dep., p. 43; DeBeau Dep., pp. 45, 48-49).

Addressing Count IV, the mileage claim, the purchase of SUV was the subject of negotiations by the County for many years prior to May 2002. (DeBeau Dep., p. 65)

Plaintiffs Molitor and Hitch in Count VI cannot show causation because the alleged retaliatory actions occurred six to eleven months after Plaintiffs filed the original complaint. The Sixth Circuit has noted that a discharge four months after filing of a discrimination claim is insufficient to support an inference of retaliation. *See Cooper v. City of North Olmstead*, 795 F.2d 1265, 1272 (6th Cir. 1986). The initial Complaint was filed on March 25, 2002. Plaintiff Molitor's rotation from the

international terminal occurred almost a year later in February 2003. The denial of Plaintiff Hitch's request to attend school occurred in September 2002.

Plaintiffs cannot show causation in their retaliations claim under FLSA.

e. Conclusion

For the reasons set forth above, Plaintiffs have failed to state a *prima facie* case of retaliation under FLSA. Counts II, IV, V and VI are dismissed.

3. Counts III and VII: Retaliation under 42 U.S.C. § 1983

a. *Prima Facie* Case

In Count III, Plaintiffs allege that Defendants violated their First Amendment right to be free from retaliation because Plaintiffs spoke out against official policy and for filing of the instant lawsuit. Plaintiffs claim Defendants promulgated and carried-out official policies, orders and directives in retaliation to the filing of the instant suit. Count VII incorporates Count III. Neither Count III nor Count VII specifically allege the policies that violated Plaintiffs' rights. In their Response, Plaintiffs

claim that if the Court were to determine that one of the acts of retaliation alleged by Plaintiffs constitutes an act of retaliation, Plaintiffs' causes of action under 42 U.S.C. § 1983 prevail. (Plaintiffs' Br., p. 32) The Court assumes that the retaliatory actions by Defendants alleged in Counts III and VII are the same retaliation actions alleged in Counts II, IV, V and VI discussed above.

"To successfully state a claim under 42 U.S.C. § 1983, a Plaintiff must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of state law." *Russo v. City of Cindnnllti*, 953 F.2d 1036 (6th Cir. 1992). The following requirements must be met: 1) the conduct at issue must have been under color of state law; 2) the conduct must have caused a deprivation of constitutional rights; and 3) the deprivation must have occurred without due process of law. *Nishiyama v. Dickson County*, 814 F.2d 277, 279 (6th Cir. 1987). As § 1983 is not itself a source of substantive rights, and only a method for vindicating federal rights elsewhere conferred, a plaintiff must set forth specific constitutional grounds for asserting a § 1983 claim. *Graham v. Connor*, 490 U.S. 386, 393-394 (1989); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

To establish a *prima facie* Section 1983 First Amendment retaliation claim, a plaintiff must demonstrate: 1) that he or she was engaged in a constitutionally protected activity; 2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and, 3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiffs constitutional rights. *Strouss v. Michigan Dep't of Corrections*, 250 F.3d 336, 345 (6th Cir. 2001); *Mattox v. City of Forest Park*, 183 F.3d 515, 520 (6th Cir. 1999); *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998). When the plaintiff is a public employee, he or she must make additional showings to demonstrate that his or her conduct was protected. *Strouss*, 250 F.3d at 345-46. First, the employee must show that his or her speech touched on matters of public concern. *See Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Second, the employee's interest "in commenting upon matters of public concern" must be found to outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811

(1968); *Boger v. Wayne County*, 950 F.2d 316, 322 (6th Cir. 1991).

b. Municipal Liability

In order for a municipality or a supervisor to be liable under section 1983 there must be some personal involvement or evidence that "execution of [the] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Generally, the doctrine of *respondeat superior* has no application in a § 1983 claim absent an allegation that the defendants were following the government's policies or customs. *Dunn v. Tennessee*, 697 F.2d 121, 128 (6th Cir. 1982).

Defendants Wayne County and Wayne County Airport Authority seek dismissal claiming that Plaintiffs cannot show a policy which is the moving force behind the constitutional violation. As this Court noted, Counts III and VII do not allege the specific policy which Plaintiffs claim violated their constitutional rights. The Court assumes that the policy or policies Plaintiffs allege are those found in

Counts II, TV, V and VI. In their response, Plaintiffs expressly state that the final, policymaking authority within the Airport was to be made by Defendant DeBeau. (*See*, Plaintiff's Br., p. 31) Based on this admission, the Court finds that Plaintiffs cannot show that Defendants Wayne County and the Airport Authority can be held liable under a *respondeat superior* theory.

c. Qualified Immunity

Defendants DeBeau and Booth claim they are entitled to qualified immunity as to Plaintiffs' § 1983 retaliation claim. In *Strauss*, the Sixth Circuit held that the doctrine of qualified immunity affords protection against individual liability for civil rights damages to officials insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Strouss*, 250 F.3d at 345. A routine disciplinary action, such as being suspended without pay does not invoke the protections of the Due Process Clause. *Id.*

Plaintiffs' Third Amended Complaint in Count III alleges that Defendants DeBeau and Booth violated their right to be free from retaliation for speaking out against

official policy by way of filing a lawsuit. (Third Am. Comp., p. 9) Count VII alleges that Defendants retaliated against Plaintiffs for exercising their First Amendment right to tile a lawsuit naming the individuals as Defendants, incorporating Count III. (Third Am. Comp., p. 17) The Court finds that Plaintiffs are alleging a First Amendment violation based on the Free Speech Clause and the Petition Clause under the First Amendment.

As to the Free Speech Clause claim, as public employees, in addition to establishing a *prima facie* case, the public employees must further allege that the speech touched on "matters of public concern." *Pickering*, 391 U.S. at 568; *Boger*, 950 F.2d at 322. Reviewing the initial Complaint, the basis of the retaliation claims in Plaintiffs' subsequent amended Complaints, the Court finds that the FLSA claim does not rise to "matters of public concern" but related only to Plaintiffs' individual concerns regarding non-payment of overtime while on call. Nothing in their FLSA claim suggests that Plaintiffs were filing a lawsuit involving "matters of public concern." *See*, *Connick*, 461 U.S. at 146-47; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985); and *Rendish v. City of Tacoma*, 123 F.3d 1216, 1221 (9th Cir. 1997) ("If a

public employee is retaliated against for filing a lawsuit, the public employee has no First Amendment claim unless the lawsuit involves a matter of public concern."). Plaintiffs have failed to state a Free Speech Clause claim under the First Amendment for filing their lawsuit under FLSA. The Free Speech Clause claim under the First Amendment is dismissed for failure to state a claim against Defendants DeBeau and Booth.

The Petition Clause under the First Amendment provides that a plaintiff has a right to file a suit to redress an injury. The issue then is whether as public employees, there must be a "public concern" requirement alleged in the suit. A panel of the Sixth Circuit has held that as of 2002, the law was not clearly established that reasonable individuals in the position of individual public officials would have known that their actions violated Plaintiffs' First Amendment right to petition for redress of grievances because the issue of whether the public concern requirement is applicable to First Amendment retaliation claims premised on the Petition Clause brought by public employees was not settled. *See*, *Nicklas v. Eagle*, 2002 WL 2026692, No. 99-2338 (6th Cir. Aug. 22, 2002 (unpublished)). Plaintiffs have not cited any case to show

that as public employees, they have a constitutional right to file lawsuits to redress grievances without alleging a public concern. Defendants DeBeau and Booth are entitled to qualified immunity because Plaintiffs have failed to establish a clearly established constitutional right which Defendants DeBeau and Booth have violated.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs Third Amended Complaint must be DISMISSED.

IT IS ORDERED that Defendants' Motion for Summary Judgment **(Docket No. 53, filed June 2, 2003)** is GRANTED.

IT IS FURTHER ORDERED that Defendants Booth and DeBeau's Motion for Summary Judgment **(Docket No. 51, filed May 30, 2003)** is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss **(Docket No. 50, filed Mary 30, 2003)** is MOOT in light of the Court's decision above.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss **(Docket No. 49, filed May 30, 2003)** is MOOT in light of the Court's decision above.

IT IS FURTHER ORDERED that this action is DISMISSED with prejudice.

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

DATED: OCT 15 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL ADAIR, ET AL.,

Plaintiffs,

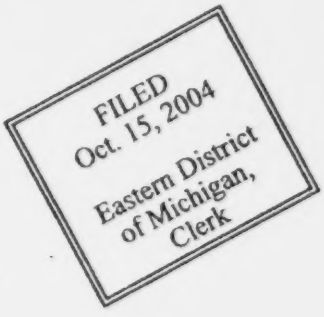
v.

Case No. 02-CV-71139-DT
Honorable Denise Page Hood

COUNTY OF WAYNE, ET AL.,

Defendants.

_____/



JUDGMENT

This action, having come before the Court and pursuant to the Memorandum Opinion and Order entered this date,

Accordingly,

Judgment is entered in favor of Defendants and against Plaintiffs with prejudice.

DAVID J. WEAVER
CLERK OF COURT

Approved:

By: /s/ David J. Weaver
Deputy Clerk

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

DATED: OCT 15 2004

Detroit, Michigan

(2)

FILED
FEB 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-912

In the Supreme Court of the United States

MICHAEL ADAIR, et al.,

Petitioners,

v.

CHARTER COUNTY OF WAYNE,
a municipal corporation, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT QUESTIONS PRESENTED FOR REVIEW

I. Have Petitioners shown any compelling reason for review by this Court as to Petitioners' retaliation claim under 42 U.S.C. § 1983, where the decision of the Sixth Circuit Court of Appeals comported with the majority view of courts that have considered whether a public employee claiming retaliation under the Petition Clause must demonstrate that a matter of public concern was involved?

II. Have Petitioners shown any compelling reason for review by this Court as to Respondents' municipal immunity, where the decision of the Sixth Court of Appeals was based on the specific facts before it, and comported with existing Supreme Court law?

PARTIES TO THE PROCEEDINGS

The Petitioners are Michael Adair, William Childress, Leon Denton, Charles Elstone, Richard Frederick, Richard Hitch, Ernest Hunter, Charles Johnson, Victor Kline, John Malaniak, Michael Molitor, Paul Molitor, Peter Molitor, David Okoney, Dean Pigott, Bruce Preston, Michael Tavtigian, John Teschke, Robert Tipton, and Bradford Vincent.

The Respondents are Charter County of Wayne, a municipal corporation, and Detroit Metropolitan Wayne County Airport Authority, a municipal corporation.

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OPINIONS AND ORDERS BELOW

The opinion of the Sixth Circuit Court of Appeals is officially reported at 452 F.3d 482 (6th Cir. 2006).

JURISDICTION

The decision of the Sixth Circuit Court of Appeals was filed on June 22, 2006. The Sixth Circuit Court of Appeals' Order denying Plaintiffs' Motion for Rehearing/Rehearing En Banc was filed on October 2, 2006. The jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within its jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

COUNTER-STATEMENT OF FACTS

In March 2002, a group of 30 law enforcement officers employed at that time by the Wayne County, Michigan Sheriff's Department and assigned to the Wayne County

Metropolitan Airport Police Department,[1] filed suit under the Fair Labor Standards Act[2] seeking compensation (at one and one-half times their normal rate of pay) for all off-duty hours during which they carried a beeper or pager. Because these police officers carried their pagers at all times, the suit sought compensation for 24 hours a day, 365 days a year. To justify their claim for pay, the officers argued that carrying the pagers was onerous and severely interfered with their personal lives.

To relieve them, and all other officers assigned to the Airport, of this burden, the Airport's Director of Public Safety[3] requested that all of the Airport's law enforcement officers turn in their pagers. The officers who had sued for overtime then amended their Complaint, adding FLSA retaliation claims. Several other officers, who were not part of the original lawsuit, also joined the suit, claiming that their pagers were removed in retaliation for their protected activity – even though the protected activity was the lawsuit that they joined only *after* the alleged retaliation.

At this same time, the airport was engaged in cost-saving efforts dictated by the increased security demands following the September 11, 2001 terrorist attacks. The Airport's Director of Public Safety therefore modified a number of

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[1] Some months after the suit was filed, a new entity, called the Wayne County Airport Authority, was created by the Michigan legislature, and became Petitioners' employer. Mich. Comp. Laws §§ 259.108 et seq.

[2] 29 U.S.C. §§ 211 et seq.

[3] The Airport's Director of Public Safety was Mark DeBeau, who was named as an individual defendant in Plaintiffs' original suit. The District Court determined that Mr. DeBeau was immune from liability, and the Sixth Circuit affirmed. He is not a party to this action.

practices affecting all of the officers employed at the Airport, including those officers who had filed the FLSA suit. Plaintiffs nonetheless claimed that those changes – the elimination of "comp time" in favor of overtime and the assignment of county-owned, fully equipped SUVs to the airport's K-9 officers – were not an effort to save money, but were personally directed at them, in retaliation for their lawsuit.

During the course of the litigation, Plaintiffs filed several amended complaints, but did not assert their claim of retaliation in violation of their First Amendment Rights under 42 U.S.C. § 1983 until May 23, 2003, after the Airport had filed its Motions for Summary Judgment. In October 2004, the District Court dismissed all of Plaintiffs' claims, including their § 1983 claims.

The Sixth Circuit Court of Appeals affirmed the District Court's decision in June 2006, in a decision reported at *Adair v. Charter County of Wayne,* 452 F.3d 482 (6th Cir. 2006). That court held that:

- Plaintiffs were not entitled to overtime pay under the FLSA because their off-duty time was utilized predominantly for their personal benefit, and not for their employers' benefit. *Adair,* 452 F.3d at 489.
- Plaintiffs were not entitled to damages under the FLSA for alleged retaliation because the complained-of acts were not materially adverse employment actions. Further, there was no evidence that those actions were caused by the filing of Plaintiffs' lawsuit, in part because the changes were applied to all of the Airport's officers and not just to Plaintiffs. *Id.* at 490-491.

- Plaintiffs failed to state a claim under 42 U.S.C. § 1983 because they had not proved that either their speech or their lawsuit for overtime pay touched on matters of public concern. *Id.* at 492.
- Both Wayne County and the Airport were immune from liability because the alleged retaliatory acts were not made by a final policymaker, and thus were not the official policy or custom of the Airport or the County. *Id.* at 493.

REASONS THE PETITION SHOULD BE DENIED

I. THERE IS NO TRUE "SPLIT AMONG THE CIRCUITS"

Litigants have no absolute right to review upon a writ of certiorari, which instead is a matter committed to this Court's discretion. In exercising that discretion, the Court may consider whether the court of appeals in the case before it "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a). Petitioners in this case claim that grant of their Writ is justified because of a conflict among the circuit courts of appeal. A "conflict" exists only in the most limited sense, however. The Sixth Circuit Court of Appeals decision below was consistent with the overwhelming majority of circuit courts that have considered the question of whether a public employee claiming retaliation by her employer under the Petition Clause must demonstrate that her actions involved an issue of public concern. Nine circuit courts of appeals have concluded that such a showing is required; only a single circuit has decided otherwise. No significant split among the circuits exists to justify this Court's review of Petitioners' claims.

In *Connick v. Myers,* 461 U.S. 138, 140 (1983), this Court recognized that, while "a public employee does not relinquish First Amendment rights to comment upon matters of public interest by virtue of government employment," the government does retain a significant interest in regulating the conduct of its employees. "[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147. The *Connick* court therefore adopted a test balancing the interests of the public employer in ensuring a smoothly functioning workplace against the rights of its employees. The rights of an employee thus can be limited when that employee is acting as an employee, seeking to advance her personal interests, rather than as a citizen acting for the public good. *Id.* at 146. Unless the alleged protected activity addresses a matter of public concern, then, it is not activity protected under the First Amendment.

Although the plaintiff in *Connick* had sought vindication of her Free Speech rights, rather than her Petition Clause rights, this Court has also determined that "the right to petition is cut from the same cloth as the other guarantees of [the First] Amendment." *McDonald v. Smith,* 472 U.S. 479 (1985)(Holding that the Petition Clause does not provide absolute immunity from a libel action).

Armed with these strictures from the Supreme Court, nine of this country's circuit courts of appeals have applied the "public concern" requirement to plaintiffs alleging retaliation by their governmental employer in violation of the Petition Clause. *See White Plains Towing Corp. v. Patterson,* 991 F.2d 1049 (2d Cir.), *cert. denied,* 510 U.S. 865 (1993); *Kirby v. City of Elizabeth City, North Carolina,* 388 F.3d 440

(4th Cir. 2004); *cert. denied*, -- U.S. -- , 126 S. Ct. 2350, 165 L.Ed.2d 294 (2006); *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989); *Valot v. Southeast Local School Dist. Bd. of Ed.*, 107 F.3d 1220 (6th Cir.), *cert. denied*, 522 U.S. 861 (1997); *Zorzi v. County of Putnam*, 30 F.3d 885 (7th Cir. 1994), *reh'g and reh'g en banc denied; Hoffman v. Mayor, Councilman and Citizens of City of Liberty*, 905 F.2d 229 (8th Cir. 1990); *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997), *reh'g and reh'g en banc denied*, 134 F.3d 1389, *cert. denied*, 524 U.S. 952 (1998); *Martin v. City of Del City*, 179 F.3d 882 (10th Cir. 1999); *Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir.), *cert. denied*, 525 U.S. 819 (1998).

Only one circuit – the Third Circuit – has reached a contrary conclusion. *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). That court determined that the U.S. Constitution's Petition Clause is broader than its Free Speech clause and provides even greater protection, in part because it seemed to the court paradoxical that a government could establish a process for "redress of grievances" such as a judicial system, and then discipline a public employee for utilizing that very process. *Id.* at 439.

Thirteen years have passed since the *San Filippo* decision. In that time, not a single other circuit has joined in the Third Circuit's analysis. Those circuits that have considered the Petition Clause/public concern issue anew during those years have expressly rejected *San Filippo* as inconsistent with Supreme Court precedent. *See, e.g., Rendish*, 123 F.3d at 1223; *Grigley*, 136 F.3d at 754; *Martin*, 179 F.3d at 887-888.

Contrary to Petitioners' bare assertion that, after *San Filippo*, courts "have failed to give this issue the sort of independent analysis it deserves" [Petition at p. 13], subsequent decisions have indeed analyzed (and rejected) the

arguments set forth in *San Filippo*. In *Rendish*, for example, the Ninth Circuit Court of Appeals carefully reviewed the Supreme Court decisions in *Connick*, which delineated the scope of public employees' constitutional rights, and *McDonald*, and concluded that providing greater protection to a public employee who "through foresight or mere fortuity" presents her speech as a grievance or in a lawsuit rather than as pure speech would implement "precisely the sort of hierarchy of first amendment rights forbidden by *McDonald*." 123 F.3d at 1222, *quoting Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-1262 (7th Cir. 1988). The court stated: "We respectfully disagree with the Third Circuit's analysis. First, it diverges from the Supreme Court's teachings that the primary function of the First Amendment is to facilitate participation in a free political process and that the First Amendment extends its guarantees to public employees in order to encourage such participation. Moreover, it equates the government's conduct as employer with its conduct as government. When government as employer disciplines an employee for pursuing litigation, it does not act as 'the very government' which established the mechanism for redress . . . but rather in its role as an employer." 123 F.3d at 1223.

This Court thus should deny Petitioners' Writ because the great majority of circuit courts of appeal have correctly concluded that only when a public employee acts as a citizen, rather than as an employee acting to protect or advance her personal interests, is that employee protected by the First Amendment.

II. THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH ITS PREVIOUS DECISIONS ON THIS ISSUE

In further support of their Writ, Petitioners claim – incorrectly -- that the decision below is inconsistent with prior decisions of the Sixth Circuit and that such "confusion" needs to be corrected by this Court. [Petition at pp. 4, 9] This argument should be rejected first because "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States,* 353 U.S. 901, 902 (1957). Secondly, there is no confusion in need of resolution because the decision of the Sixth Circuit below was entirely consistent with its previous decisions.

Petitioners claim that the Sixth Circuit decision in *Gable v. Lewis,* 201 F.3d 769 (6th Cir. 2000) *reh'g and reh'g en banc denied,* is somehow at odds with its decision in the present case, as well as with its rulings in *Jones v. Union City,* 296 F.3d 417 (6th Cir. 2002) and *Valot, supra.* This is simply incorrect. The issue confronted by the court in *Gable* was not whether a public employee alleging retaliation under the Petition Clause must demonstrate that her actions involved a matter of public concern. The plaintiff in *Gable* was not a public employee at all, but "simply a citizen offering services to a state agency." *Gable,* 201 F.2d at 771. The Sixth Circuit thus declined to require evidence of a public concern, because "the reason for the test is missing in the present case – maintaining order in the governmental workplace." *Id.*

In contrast, the plaintiffs in *Valot, supra,* and *Jones, supra* were public employees – as were Petitioners in this case. Consistent with the decisions of many circuits, the Sixth

Circuit has crafted a clear and rational approach to the issue.[4] It is neither internally inconsistent nor confusing and does not require intervention by this Court.

III. THE SIXTH CIRCUIT'S CONCLUSION THAT PETITIONERS WERE NOT ENGAGED IN PROTECTED ACTIVITY WAS NOT OUTCOME-DETERMINATIVE

No compelling reason exists for this Court to review the decision below because the issue urged upon the Court for review did not determine the Sixth Circuit's ultimate decision. While the Sixth Circuit concluded that Petitioners had not established either a Free Speech or Petition Clause claim, the court went on to state that, "[e]ven if Plaintiffs were able to demonstrate that they were deprived of a federal constitutional right. . . they must also show that an official policy or custom of Wayne County or the Airport was the moving force behind the constitutional violation." *Adair, supra,* 452 F.3d at 492-493. Applying the specific facts of the case to the standards for municipal liability crafted by the Supreme Court in *Monell v. Dep't of Soc. Services,* 436 U.S. 658 (1978) and *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986), the Sixth Circuit determined that neither the County nor the Airport had adopted an official policy or custom resulting in a constitutional injury to Petitioners. *Id.* at 493. The court relied on two factors in reaching this conclusion: first, that the alleged retaliatory actions (removal of pagers, modification of rules for the use of compensatory time; provision of SUVs to

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[4] *See, for example, Thaddeus-X v. Blatter,* 175 F.3d 378, 392 (6th 1999)(en banc), in which the Sixth Circuit concluded that the "public concern" test did not apply to a *prisoner's* right to petition the government, because the government's interest in a harmonious workforce was not at issue.

the K-9 unit) were not taken by County or the Airport itself but by the Airport's Director of Public Safety. Petitioners' contentions notwithstanding, the court below stated that even while such a position "carries with it considerable influence," it is not the position of a final policymaker. *Id.* The court noted further that the specific actions alleged by Petitioners as violative of their constitutional rights "lack the sort of force and finality characteristic of official municipal policy." *Id., citing City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) and *Monell, supra.* [5]

Thus, the Sixth Circuit held that, even if Petitioners had engaged in protected activity, their § 1983 claim still would fail, because the Airport and County were immune from liability. Even if this Court were to reverse the Sixth Circuit's conclusion that Petitioners were required to demonstrate that their lawsuit was a matter of public concern, the ultimate result of the case would not be affected. There thus are no compelling reasons to grant the Writ, and so it should be denied.

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[5] Petitioners attempt to sidestep this weakness in their claim by urging this Court also to review that aspect of the decision below. [Petition at pp. 19-20] Petitioners fail to articulate even the most modest justification for review of that issue, however, claiming only that the Sixth Circuit made a factual error, because the Director of Public Safety had "decision making authority." That hardly rises to the level of being a "final policy maker," however, and presents no compelling reason for this Court to review the factual determination made below.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: February 5, 2007